

Making a Molehill out of a Mountain: The U.S. Army's Counterinsurgency Doctrine Applied to Operational Law in Iraq*

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I. Introduction

On 11 September 2001, the American homeland was attacked by a new and complex enemy; one that did not comply with the traditional rules of combat or ascribe to a doctrine conventional U.S. Armed Forces were trained to confront. When America deployed its military to confront this enemy, first in Afghanistan and then in Iraq, U.S. forces found, instead of orderly combat maneuvers through open tracts of land, an enemy that had congealed into small adaptable insurgent groups. Unrestrained by respect for international laws or convention, these insurgent groups employed insidious fighting tactics, such as hiding among civilians on U.S. domestic airlines and in the warrens of Baghdad's neighborhoods. Not long after the wars in Afghanistan and Iraq began, military leaders resurrected the doctrine of counterinsurgency (COIN) in order to forge victory against this new threat.¹

* This article is the fourth in a series of articles written by members of the XVIII Airborne Corps Office of the Staff Judge Advocate following their deployment as the Multi-National Corps–Iraq, Headquarters, 2008–2009. Each article in the series discusses one significant legal issue that arose in each of the Corps's functional legal areas during the deployment. Articles in the series cover issues that arose in Administrative Law, Rule of Law, Contract and Fiscal Law, Operational Law, Criminal Law, and Foreign Claims. The authors would like to thank the extraordinary contribution of Lieutenant Colonel (LTC) Robert Bowers, former Chief, Operational Law Division, XVIII Airborne Corps and Multi-National Corps–Iraq, whose contributions and tireless work made this paper possible. Additionally, the authors would like to thank LTC Jack Ohlweiler, Deputy Staff Judge Advocate, XVIII Airborne Corps and Multi-National Corps–Iraq, whose editing acumen proved invaluable. Finally, the authors would like to thank the entire Operational Law Division at Multi-National Corp–Iraq that served from February 2008 through April 2009.

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¹ The U.S. military has addressed counterinsurgency (COIN) in some form or another throughout the nation's history. Take for example this quote from the Vietnam era:

Pacification, as it applies in the Republic of Vietnam is the military, political, economic and social process of establishing or re-establishing local government responsive to and involving the participation of the people. It includes the provision of sustained, credible territorial security, the destruction of the enemy's underground government, the assertion or reassertion of political control and involvement of the people in the government, and the initiation of economic and social activity capable of self-sustenance and expansion

U.S. MILITARY ASSISTANCE COMMAND VIETNAM, U.S. ARMY, HANDBOOK FOR MILITARY SUPPORT OF PACIFICATION 1 (Feb. 1968).

Out of the crucible of combat, the military produced Field Manual 3-24,² which encapsulates the Army's COIN doctrine. The field manual states, "Current tactics, techniques, and procedures sometimes do not always achieve desired results. When that happens, successful leaders engage in a directed search for better ways to defeat the enemy."³ From February 2008 until April 2009, the XVIII Airborne Corps (XVIII ABN Corps) was deployed to Iraq as Multi-National Corps–Iraq (MNC–I).⁴ During XVIII ABN Corps's tenure in Iraq, the Army faced the need to rapidly adapt tactics to the ever-changing operational environment⁵ of a COIN offensive combined with the urban insurgent approach.⁶ As a result of this change in tactics, each MNC–I staff section needed to examine and then adapt their specific operations to the application of COIN strategy in the Iraq theater of operations.

The XVIII ABN Corps Office of the Staff Judge Advocate (OSJA) was not spared in this reexamination of processes and procedures. During the course of the deployment to Iraq, the judge advocates (JAs) of the OSJA

² U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY 1-28 (15 Dec. 2006) [hereinafter FM 3-24]. During our deployment, we found that the FM 3-24 helped staff officers think of enemy operations in certain categories outlined in the manual. This allowed them to more effectively focus their efforts instead of operating from a blank slate.

³ *Id.* at x.

⁴ Multi-National Corps–Iraq (MNC–I) was the corps operational echelon of command. A corps commands and controls two or more divisions in a theater. *See* U.S. DEP'T OF THE ARMY, FIELD MANUAL 100-15, CORPS OPERATIONS (29 Oct. 1996). A corps converts strategic echelon guidance into goals and objectives for the tactical echelon. When XVIII Airborne Corps (XVIII ABN Corps) deployed to Iraq and took over as MNC–I, the XVIII ABN Corps Commander became the MNC–I Commander. As the MNC–I Commander, he oversaw operations by all members of the multi-national coalition throughout the Iraq area of operations. In February 2008, MNC–I was comprised of: Multi-National Division–North (U.S. Command overseeing provinces of Ninevah, Tamim, Salahuddin, and Diyala), Multi-National Division–North-East (Republic of Korea Command overseeing provinces of Dahuk, Irbil, and Sulaimaniyah), Multi-National Division–South-East (U.K. Command overseeing provinces of Maysan, Dhi Qar, Basra, and the majority of Muthanna), Multi-National Force–West (U.S. Command overseeing provinces of Anbar and parts of Karbala), Multi-National Division–Baghdad (U.S. Command overseeing the City of Baghdad), Multi-National Division–Center (U.S. Command overseeing the provinces of Wasit, Babil, and Najaf in their entirety, and parts of Baghdad, Karbala, and Muthanna), and Multi-National Division–Central–South (Polish Command overseeing the province of Qadisiyah).

⁵ An operational environment is a composite of the conditions, circumstances, and influences that affect the employment of capabilities and bear on the decisions of the commander. *See* JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE MILITARY ASSOCIATED TERMS (12 Apr. 2001) [hereinafter JOINT PUB. 1-02].

⁶ FM 3-24, *supra* note 2, at 1-23. Field Manual 3-24 describes how urban insurgencies are dynamic and can replace losses quickly, requiring flexibility and adaptive responses from the counterinsurgent force.

learned, firsthand, the intricacies of utilizing operational law (Op Law) in a COIN environment.⁷ In particular, the Army's change in tactics required Op Law JAs to play a vital role in the planning and conduct of the Army's COIN operations.⁸

In an effort to share lessons learned from this experience, the purpose of this article is to (1) highlight the overarching principles of conducting a successful COIN operation; (2) apply those principles in an Op Law context; and to (3) discuss how the XVIII ABN Corps OSJA leveraged Op Law to support the MNC-I Commander's development of a successful COIN strategy during its 2008–2009 deployment. This article will first examine the basic planning principles necessary to conduct a successful COIN campaign. The article will then focus specifically on the different stages of a COIN campaign as XVIII ABN Corps proceeded from one stage to the next because of its success over the course of its deployment in Iraq.

II. Conducting Counterinsurgency Planning and Assessing Counterinsurgency Tactics and Techniques—The Never Ending Battle

*"The first, the supreme, the most far-reaching act of judgment that the statesman and commander have to make is to establish . . . the kind of war on which they are embarking; neither mistaking it for, nor trying to turn it into, something that is alien to its nature. This is the first of all strategic questions and the most comprehensive"'*⁹

As with all military operations, the preparation for and assessment during a COIN operation is critical to the overall success of the mission.¹⁰ One of the difficulties in a COIN operation is the additional training necessary to prepare a conventional military force for a type of mission that is not necessarily congruent with the normal instincts and general approach that is required to achieve victory in a conventional

⁷ The Operational Law (Op Law) Division embedded judge advocates (JA) in each of the three corps staff planning horizons. The C3 Current Operations on the Joint Operations Center floor was manned 24/7 and focused on command and control of the present battle to a few hours out; the C35 Future Operations conducted planning a few hours to a few weeks out; and C5 Future Plans, conducted planning a few weeks to months out. Operational law also embedded one JA in Information Operations in support of the robust psychological operations program. These embedded resources were in addition to the JAs working in the Op Law Division's main office.

⁸ *Id.* See also FM 3-24, *supra* note 2, at 1-6. Field Manual 3-24 explains how the urban approach uses terrorist tactics to sow disorder and intimidate the population among other actions.

⁹ CARL VON CLAUSEWITZ, ON WAR 88–89 (Michael Howard & Peter Paret ed., Princeton Univ. Press 1984) (1976).

¹⁰ See generally FM 3-24, *supra* note 2, at 4-1 to 4-9. This entire chapter describes the importance of planning and campaign design during a COIN operation.

conflict.¹¹ The process the American military has gone through since 11 September 2001 to shed those heavily ingrained conventional perceptions and instincts is a testament to the additional burdens of a COIN operation.¹² In order to stay one-step ahead of an insurgent force in COIN, commanders and their staffs must continually assess their original plans and adjust accordingly.¹³ Changing the perspective of staff sections and their standard operational planning procedures to handle the unique challenges of a COIN operation can be a battle in and of itself.

It would be impossible to examine the COIN conflict in Iraq from an Op Law perspective without also understanding the general COIN principles involved, the battlefield situation, and the specific needs of commanders as they adapt to the dynamic battlefield. In order to discuss how Op Law is uniquely suited to help commanders at all junctures during COIN operations, this part will examine: (1) campaign design, planning, and preparations using COIN doctrine before deployment to Iraq;¹⁴ (2) the XVIII Airborne Corps Op Law Division's role in the facilitation of the planning, assessing, and when necessary, reshaping of operations during the COIN campaign in Iraq; and (3) the Op Law Division's efforts to focus other MNC-I staff sections on the long-term implications, both legal and of a general nature, of their decisions on COIN in Iraq.

¹¹

The measurement of conventional military 'victory' is straightforward enough: loss of ground, loss of force, loss of will, building to a sum which determines the loss of the war The form and sequence of military operations aim to maximize the application of force to overpower the enemy.

CHARLES TOWNSHEND, BRITAIN'S CIVIL WARS—COUNTERINSURGENCY IN THE TWENTIETH CENTURY (1986).

¹² See FM 3-24, *supra* note 2, at ix.

¹³ See generally *id.* at 4-1 to 4-9. This point is further illustrated by the following quote discussing the issues militaries face when confronted with an insurgent campaign:

The first necessity is obviously for armies in such cases to adapt as quickly as possible, and develop a new repertoire of techniques suited to the complexity of the problem. It is, however, not always easy to see at the outset what skills will be useful; and vision can be further restricted by military conservatism. Soldiers may not want to develop new skills. Precisely because normal military logic is negated in counterinsurgency, Soldiers have an intense dislike of internal security duties. When called to aid the civil power, they naturally try to preserve as large a sphere of autonomy, within which they can maintain their traditional priorities, as they possibly can. Thus at the beginning, and often throughout the course of each campaign, there has been a direct clash between civil and military logic.

See TOWNSHEND, *supra* note 11.

¹⁴ FM 3-24, *supra* note 2, at 4-1 to 4-9.

A. Pre-Deployment Preparation

“Before commanders deploy their units they make every effort to prepare their Soldiers and Marines for the anticipated challenges with a particular focus on situational awareness of the anticipated AO [Area of Operations]”¹⁵

For commanders, the preparation for combat operations requires a vastly different focus than the normal, routine garrison tasks; however, the preparation for COIN operations entails additional demands.¹⁶ A COIN operation requires intense study of the civil and political issues, as well as the cultural and civil considerations that may affect military operations in the anticipated area of operations.¹⁷ Commanders use METT-TC (Mission, Enemy, Terrain, Troops, Time, and Civil)¹⁸ to describe the underlying considerations for military planning. In COIN operations, the civil component weighs more heavily than in other forms of warfare because the objective is to gain the support of the civilian populace.¹⁹

The broad spectrum of operations in a forward-deployed COIN environment creates a unique challenge when compared with the fairly static garrison requirements for an OSJA Op Law Division. In garrison, Op Law JAs often review long-term contingency planning for operations that may never happen, participate in garrison force protection and homeland defense exercises, and provide legal training.²⁰ As the train-up and planning for COIN operations begins, however, Op Law JAs can provide significant support to a commander’s planning initiatives by integrating closely with the staff and injecting legal considerations into standard pre-deployment training. To be effective, Op Law

JAs must research and train to better understand the cultural and legal aspects in the area of operations.²¹

When preparing to enter an ongoing COIN, the battle is already being waged by units in the field. XVIII Airborne Corps’s predecessors at MNC-I was III Corps who were in the process of implementing and realizing the surge strategy.²² This strategy significantly raised troop levels in Iraq with the hope of creating enough of a military footprint to temporarily quell the violence in Iraq while the political actors could work out the underlying disputes between the different ethnic and social groups.²³ During the pre-deployment phase, units must prepare for the operating environment they will face and for XVIII ABN Corps this meant looking at the current situation in Iraq under III Corps and reaching out to them to confer about the environment.²⁴ Staff sections were busy learning about Iraq and then ultimately planning how XVIII ABN Corps would implement the MNC-I Commander, Lieutenant General (LTG) Lloyd Austin III’s vision of what he hoped to accomplish during the deployment.

During pre-deployment train-up, the XVIII ABN Corps Op Law team followed a simple plan to meet the complex demands of planning for a COIN operation: research, integrate, and educate. In addition to completing the U.S. Army Forces Command (FORSCOM) task list requirements,

²¹ See FM 3-24, *supra* note 2, at 5-4

Prior to operations, Op Law JAs, paralegal NCOs, and Soldiers conduct contingency planning, deployment preparation, and training. Op Law JAs develop staff skills and working relationships at all times, not merely before deployment. Deployment preparation is a cooperative effort between the Op Law JA, the command or chief paralegal NCO, the legal administrator, and other key personnel. It includes developing standing operating procedures, identifying deploying personnel, marshaling resources, and establishing liaisons. This pre-deployment training develops the soldiering and legal skills of legal personnel, provides mission-related legal information to unit personnel, integrates legal personnel into the unit, and establishes working relationships with reserve components legal personnel who will support the deployment.

¹⁵ *Id.* at 4-6.

¹⁶ See generally *id.* at 4-1 to 4-9. Though preparing a Soldier to go to war in any conflict is difficult, time consuming, and demanding, the preparation for COIN operations requires leaders to train Soldiers to look beyond the classic find, fix, and defeat model and to adopt a more thoughtful approach examining the potential strategic impact of every decision made on the ground.

¹⁷ *Id.* at 1-15.

¹⁸ U.S. DEP’T OF ARMY, FIELD MANUAL 5-0, ARMY PLANNING AND ORDERS 1-4 (20 Jan. 2005) [hereinafter FM 5-0].

¹⁹ See FM 3-24, *supra* note 2, at 1-1 (“Long-term success in COIN depends on the people taking charge of their own affairs and consenting to the government’s rule.”).

²⁰ U.S. DEP’T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY 5-4 (15 Apr. 2009) [hereinafter FM 1-04]. Legal training includes training described in Army Regulation (AR) 350-1, *Army Training and Leader Development*, AR 350-30, *Code of Conduct, Survival, Evasion, Resistance, and Escape (SERE) Training*, and any other subject tailored to the needs of corps command and staff and corps separate brigade commanders. U.S. DEP’T OF ARMY, REG. 350-1, ARMY TRAINING AND LEADER DEVELOPMENT para. 4-18 (3 Aug. 2007) [hereinafter AR 350-1] (law of war), U.S. DEP’T OF ARMY, REG. 350-30, CODE OF CONDUCT, SURVIVAL, EVASION, RESISTANCE, AND ESCAPE (SERE) TRAINING (10 Dec. 1985).

Id.

²² President George Walker Bush, State of the Union Address (Jan. 23, 2007) [hereinafter Bush, State of Union Address], available at <http://georgewbush-whitehouse.archives.gov/news/releases/2007/01/20070123-2.html>.

²³ Michael Duffy, *The Surge at Year One*, TIME MAG., Jan. 31 2008, available at <http://www.time.com/time/magazine/article/0,9171,1708843-1,00.html>.

²⁴ Staff officers at XVIII ABN Corps discussed the situation in Iraq with III Corps through a variety of methods including video-teleconference and pre-deployment visits to Iraq. Op Law JAs at XVIII ABN Corps reached out to III Corps’s Op Law Division to learn about the current legal issues in theater. The authors would like to especially thank U.S. Army Captain Josh Berry and the other members of III Corps OSJA whom many of the XVIII ABN Corps Op Law JAs considered friends even before arriving in Iraq and meeting them in person.

mandated internal staff training, and the mission rehearsal exercise (MRX) required for all deploying personnel, Op Law also explored a number of areas in greater depth. For example, Op Law JAs facilitated internal leadership professional development sessions using the books on the reading list of General David H. Petraeus,²⁵ the Commander of Multi-National-Force (MNF-I), to improve the OSJA's understanding of Arabic culture, Islam, Iraqi history, and the geography of Iraq.²⁶ Operational Law JAs sought to gain at least a rudimentary understanding of Arabic by participating in an Arabic language-training program. In addition, Op Law JAs traveled to Islamic relations and counterinsurgency conferences in South Carolina²⁷ and the U.S. Military Academy,²⁸ and the Op Law Division sponsored a three-day Op Law conference for the entire OSJA featuring professors, who were experts in the fields of Iraqi history, culture, and COIN doctrine, from the U.S. Military Academy and several North Carolina universities.

In order to build trust and facilitate a good working relationship while deployed, Op Law JAs should integrate with their supported staff during the pre-deployment preparation to a COIN. For example, the XVIII ABN Corps OSJA received training from various staff sections including the XVIII ABN Corps's intelligence section, explosive ordnance disposal (EOD) team, and the corps civil affairs cell.²⁹ In preparation for reviewing kinetic strike target packets, air liaison officers and artillery Soldiers provided training on the Joint Integrated Prioritized Target List³⁰ and air tasking order³¹ procedures; training and certification on

²⁵ General Petraeus published a reading list consulted by the Op Law Division at XVIII ABN Corps. *See generally* VALI NASR, THE SHIA REVIVAL (2006); T.E. LAWRENCE, SEVEN PILLARS OF WISDOM: A TRIUMPH (1926); and GILLES KEPPEL, THE WAR FOR MUSLIM MINDS: ISLAM AND THE WEST (2004).

²⁶ Multi-National Force-Iraq (MNF-I) was the strategic level headquarters for all military and diplomatic coalition operations in Iraq. The MNF-I worked closely with the U.S. Department of State and the Government of Iraq to ensure U.S. operations in Iraq met the needs of the Iraqi people.

²⁷ The Rudolph C. Barnes Symposium, *Legitimacy, Legal Development & Change*, University of South Carolina School of Law (Feb. 2–3, 2007).

²⁸ Law of Armed Conflict Seminar, Law and Terrorism, Department of Law, U.S. Military Acad. (Sept. 26–28, 2007).

²⁹ Often Op Law JAs, when giving yearly and pre-deployment legal briefing, would ask the staff section if they would be willing to come to brief the Office of the Staff Judge Advocate (OSJA) on their field of expertise. The other staff sections enthusiastically supported these briefings often using them as an assessment of their own readiness.

³⁰ *See* JOINT PUB. 1-02, *supra* note 5. A prioritized list of targets approved and maintained by the joint force commander. Targets and priorities are derived from the recommendations of components and other appropriate agencies, in conjunction with their proposed operations supporting the joint force commander's objectives and guidance.

³¹ *Id.* A method used to task and disseminate to components, subordinate units, and command and control agencies projected sorties, capabilities, and/or forces to targets and specific missions. Normally provides specific instructions to include call signs, targets, controlling agencies, etc., as well as general instructions.

the collateral damage estimate methodology;³² and members of the Op Law team went to the firing range to participate in fire direction center procedures.³³ All of the Op Law Divisions' pre-deployment cross training and networking helped build relationships that proved crucial when operating within Iraq.³⁴

The XVIII ABN Corps OSJA maximized the benefit of their research and training by educating units throughout the Corps during legal pre-deployment training briefings. While Soldiers are required to receive both annual and pre-deployment Law of War (LoW) training,³⁵ the XVIII ABN Corps's Op Law Division tailored the training to include the most up-to-date information from both Operation Iraqi Freedom and Operation Enduring Freedom to prepare servicemembers to handle the COIN battlefield. From best practices, tactics, techniques, and procedures to regional peculiarities, the Op Law Division infused sect- and insurgent group-specific realism into training vignettes to better sensitize servicemembers to the consequences of transgressions.³⁶ The Op Law team believed that by arming servicemembers with a more exacting baseline of knowledge it would enable them to significantly refine their mission analysis.

Operational Law JAs must be proactive during the planning phase of COIN operations by preparing themselves both individually and as an office for the unique cultural considerations of a COIN conflict. By taking the time to research the projected theater of operations, assisting in the facilitation of internal office training and leadership development, integrating with other staff sections, and developing relationships with JAs currently on the battlefield, Op Law JAs can establish a solid pre-deployment foundation while setting the conditions for mission success.

³² JOINT CHIEFS OF STAFF, JOINT MANUAL 3160.01B, JOINT METHODOLOGY FOR ESTIMATING COLLATERAL DAMAGE AND CASUALTIES FOR CONVENTIONAL WEAPONS: PRECISION, UNGUIDED, AND CLUSTER (31 Aug. 2007).

³³ This included a special opportunity for the XVIII ABN Corps Op Law team during which JAs were able to pull the lanyard on the new M777 155mm howitzer.

³⁴ *See* FM 5-0, *supra* note 18, at 3-40. During a COIN operation, the most entrepreneurial staff sections work on areas which fall well outside their traditional staff roles. By virtue of the OSJA pre-deployment preparation, other staff sections within the XVIII ABN Corps staff relied on the OSJA to develop solutions to a variety of non-legal issues.

³⁵ *See* AR 350-1, *supra* note 20, para. 4-18. While the authors would prefer to use the term Law of Armed Conflict (LOAC) to describe modern *jus ad bellum* and *jus in bello* authority, current U.S. Army doctrine continues to use the term Law of War.

³⁶ For example, in the current version of the XVIII ABN Corps 350-1 training, JAs instruct servicemembers on how the incidents at Abu Ghraib and Haditha, while instigated by junior servicemembers, had a major strategic impact on the entire Iraqi campaign.

B. Assessment—The Art of Fine Tuning the Battle Plan

“The Operational Environment is likely to display a complex, shifting mosaic of conditions. To be effective, commanders—and indeed all personnel—continually develop and enhance their understanding of the mosaic peculiar to their AO.”³⁷

The Army’s COIN manual states, “Assessment is the continuous monitoring and evaluation of the current situation and progress of an operation. Effective assessment is necessary for commanders to recognize the changing conditions on the battlefield and determine their meaning.”³⁸ Effective assessment begins at the pre-deployment stage, but it must happen continuously throughout the deployment during a COIN campaign. In all commands, staff sections must continuously evaluate operations and refine their assessments and recommendations in order to help the commander focus efforts across the battlefield.³⁹

Operational Law JAs ensure that staff sections comply with international and domestic law⁴⁰ when responding to the ever-changing realities of COIN operations.⁴¹ Operational Law JAs should be involved in designing the campaign plan pre-deployment and in assessing and revising the campaign plan during the deployment as each shift on the battlefield brings new challenges.⁴² Campaign design must be a living process that reflects ongoing learning and adaptation, including the growing appreciation counterinsurgents share for the environment and all actors within it.⁴³ During assessments of a COIN battle plan, JAs may advise on treaties with neighboring states that impact border operations, employment of existing or new weapons and ordnances, the ability to target individuals, such as

³⁷ FM 3-24, *supra* note 2, at 4-6.

³⁸ *See id.* at 4-6.

³⁹ Brigadier General Daniel B. Allyn, Chief of Staff, XVIII ABN Corps, Address to Senior Planners at Multi-National Corps–Iraq (Mar. 2009) (providing After Action Review comments). A corps differs from a brigade or battalion because at those levels, the commander can make adjustments to his operational plan by directly controlling troops in daily contact with the enemy.

⁴⁰ U.S. DEPT’ OF DEF., DIR. 2311.01E, DEPARTMENT OF DEFENSE LAW OF WAR PROGRAM (9 May 2006). The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law. Commanders must ensure all plans, policies, directives, and rules of engagement issued by the command and its subordinate commands and components are reviewed by legal advisers to ensure their consistency with this Directive and the law of war.

⁴¹ FM 3-24, *supra* note 2, at 4-1 to 4-9.

⁴² This continuous assessment and monitoring was reflected in the XVIII ABN Corps’s focus on the flow of money, weapons, and fighters crossing into Iraq from Iran. Subsequently, Op Law JAs worked closely with planners on cross-border considerations.

⁴³ FM 3-24, *supra* note 2, at 4-4. Counterinsurgents must understand who the important actors are and the cultural sensitivities of the environment because that dictates the operational plan.

financiers or sniper trainers, within gray areas of the rules of engagement⁴⁴ (ROE), and the conformance of kinetic and non-kinetic operations with existing regulations and guidance. The input of Op Law JAs is critically important when staff sections reassess their pre-deployment COIN plan after first contact with the enemy. Operational Law JAs can provide not only international law guidance, but can also help inform the military decision making process by highlighting potential legal considerations.

The difference between examining a COIN while viewing PowerPoint briefings and receiving telephone calls during garrison pre-deployment preparations and sitting on the Joint Operations Center (JOC) floor addressing issues once in theater is substantial. Planning sections frequently begin altering campaign plans originally designed in the rear to account for the changing environment on the ground. When XVIII ABN Corps arrived in Iraq, violence was plummeting in some areas while it was increasing in others. In areas of decreasing violence, escalation of force (EOF) measures were adapted to prevent the alienation of local citizens by operational heavy handedness that undermined the objective of obtaining their support. Additionally, when local Iraqi security forces⁴⁵ were determined to be capable of handling local threats, Coalition battlespace owners would enter Provincial Iraqi Control⁴⁶ Memorandums of Understanding memorializing the transfer of responsibility for security and placing Iraqis primarily in charge. Where violence was increasing, more precise applications of both kinetic and non-kinetic force were required. Multi-National Corps–Iraq directly addressed increasing violence by becoming involved in named offensives when they crossed

⁴⁴ JOINT CHIEFS OF STAFF, INSTR. 3121.01, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES (13 June 2005). Rules of engagement are directives issued by a competent military authority. They delineate the circumstances and limitations under which U.S. forces can initiate combat or can continue to engage in combat with other forces.

⁴⁵ The term “Iraqi security forces” includes forces under the control of the Iraqi Ministry of Defense, including the Army, Air Force, and Navy. The term also encompasses forces under the Iraqi Ministry of the Interior, including the National Police, Provincial Police forces, and the security forces of the Department of Border Enforcement.

⁴⁶ Multi-National Corps–Iraq used the Provincial Iraqi Control model to drive the assessment process of Iraq’s movement towards security and sustainability. Iraq’s eighteen provinces would be individually evaluated and transitioned from coalition to self-control and security. Provinces transitioned to Iraqi control when circumstances, such as a reduced threat level relative to government and security force (police and military) capabilities, warranted. Provincial Iraqi Control Memorandums of Understanding concluded between the various provincial governments and the U.S. formalized Iraqi control. This process of transitioning to Iraqi control was still ongoing when the Security Agreement (SA) was implemented on 1 January 2009; the SA effectively assigned responsibility for Iraqi security to the Government of Iraq. *See Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, U.S.-Iraq, Nov. 17, 2008* [hereinafter Security Agreement].

major subordinate command (MSC) battlespace boundaries and by tasking Corps assets⁴⁷ to weigh in on MSC efforts.

The XVIII ABN Corps conducted a number of longer-term assessments with substantial legal import. Operational Law JAs worked with the various Corps staff sections and JAs in our MSCs to help increase governmental capacity while diminishing insurgent viability.⁴⁸ Another long-term assessment was the provincial elections held in the fall of 2008 when Op Law JAs worked hard to ensure that planners accounted for the monetary and legal implications associated with providing security for polling stations throughout Iraq. The advice of Op Law JAs was also pivotal to planning for the expiration of the United Nations Security Council Resolution (UNSCR)⁴⁹ that had provided the authority under which Coalition forces⁵⁰ had been operating since the war's inception. The expiration of the UNSCR on 31 December 2008 would be the most enduring concern during XVIII ABN Corps's time in Iraq.

The dynamic nature of COIN requires aggressive and continuous assessments by commanders and their staffs. Operational Law JAs should assist in this process by integrating themselves into other staff sections. Operational Law JAs can act as neutral observers able to identify flaws, both legal and of a general nature, that may not be apparent to planners in the heat of the frenetic planning cycle. This fresh perspective can be crucial to pursuing a logical and measured response to changes on the battlefield during COIN operations.

⁴⁷ Multi-National Corps–Iraq directly controlled several organic brigades, which were separate and apart from the maneuver units controlled by Division commanders; these brigades were called “Corps separates” for short. The Corps separates each provided specialized skill sets, which could be used to enhance the Corps commander’s command and control of the battlespace. For example, MNC-I sent the 525th Battlefield Surveillance Brigade (525th BfSB) to northeastern Iraq to close a gap in both intelligence and battlespace coverage.

⁴⁸ One mechanism for accomplishing this was through the Op Law JA in the MNC-I Psychological Operations section who reviewed various products that sought to encourage Iraqis to put faith in their government. Another mechanism for this was by telling JAs in our Major Subordinate Commands (MSC) to increase their efforts to work directly with Iraqis to determine how Coalition Forces could help foster the rule of law within Iraq.

⁴⁹ U.N. Security Council Resolution (UNSCR) 1546 granted MNF-I its authority, and subsequent resolutions renewed the authorization. S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004). XVIII ABN Corps assumed command of MNC-I under the authority of the last extension, S.C. Res. 1790, U.N. Doc. S/RES/1790 (Dec. 18, 2007).

⁵⁰ The term “Coalition Forces” refers to all foreign forces that were in Iraq under the command of MNF-I. As of February 2008 when XVIII ABN Corps took over as MNC-I, the Coalition included forces from Albania, Armenia, Australia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Czech Republic, Denmark, Dominican Republic, El Salvador, Estonia, Georgia, Honduras, Hungary, Iceland, Italy, Japan, Kazakhstan, Latvia, Lithuania, Macedonia, Moldova, Mongolia, Netherlands, New Zealand, Nicaragua, Norway, Philippines, Poland, Portugal, Romania, Singapore, Slovakia, South Korea, Spain, Thailand, Tonga, Ukraine, and the U.K.

C. Plan Discipline—Keeping the Staff Focused on Long-Term Implications of COIN Planning

“Counterinsurgents should prepare for a long-term commitment.”⁵¹

Counterinsurgency, by its nature, is a long-term commitment whose cost must be borne by the American people.⁵² To preserve the national will and prevent disenchantment with U.S. efforts during COIN operations, U.S. forces must operate both within the legitimate bounds of international law and without the civilian casualties seen in earlier U.S. COIN conflicts.⁵³ This commitment to minimizing civilian casualties and staying within the bounds of international law also has a tremendous impact on the host population, which may otherwise feel threatened by the presence of foreign forces.

One of the most important functions for Op Law JAs during a COIN conflict is to make sure that the staff sections account for international law in all planning and operational effects.⁵⁴ Operational Law JAs are particularly well-suited for this role and must be proactive in voicing concerns about possible violations of both international and U.S. laws.⁵⁵ This is particularly important, because a commander may incorrectly interpret international law, resulting in abuses, even though the commander may have had no malicious intentions.

The ability of American forces to minimize LoW violations and to take appropriate action regarding those breaches that did occur gave legitimacy to U.S. and coalition force operations in the eyes of both the U.S. and Iraqi populations. By minimizing transgressions and quickly addressing violations when they happened, XVIII ABN Corps set the conditions for a change in popular opinion within the United States towards military operations in Iraq.⁵⁶

⁵¹ FM 3-24, *supra* note 2, at 1-24.

⁵² *Id.*

⁵³ For example, most estimates place the cost to civilian lives in the Vietnam War at approximately 2 million; see Philip Shenon, *20 Years After Victory, Vietnamese Communists Ponder How to Celebrate*, N.Y. TIMES, Apr. 23, 1995, at A12. This is in comparison to the estimates from the Associated Press which place the number of Iraqi civilian deaths from the 2003 invasion until April 23, 2009 at 110,600; see Kim Gamel, *AP Impact: Secret Tally Shows Violence Has Killed 87,215 Iraqis Since 2005*, ASSOC. PRESS, Apr. 23, 2009, available at <http://abcnews.go.com/International/WireStory?id=7411522>.

⁵⁴ U.S. DEP’T OF DEF., DIR. 2311.01E, DOD LAW OF WAR PROGRAM para. 5-11 (9 May 2006) (“The Commanders of the Combatant Commands shall . . . [e]nsure all plans, policies, directives, and rules of engagement issued by the command and its subordinate commands and components are reviewed by legal advisers to ensure their consistency with this Directive and the law of war.”).

⁵⁵ See FM 1-04, *supra* note 20, at 5-3.

⁵⁶ See, e.g., GALLUP, *Public Opinion on Iraq* (July 2009), available at <http://www.gallup.com/poll/1633/Iraq.aspx>. This poll and the

In order to allow U.S. forces to accomplish their mission and address the worst issues of the Iraqi insurgency, XVIII ABN Corps Op Law JAs had to foster, across both the corps staff and the subordinate commands, the absolute need for all operations to comply with international law.⁵⁷ Following the adverse publicity of high profile events such as Abu Ghraib and Haditha, Op Law JAs began incorporating specific lessons learned from these incidents into briefings and discussions with corps staff. The cumulative effect of the previous abuses and subsequent fall out during earlier phases of the Iraq conflict, as well as the efforts of JAs, was to engender an operational climate where proactive compliance was the norm.⁵⁸ These efforts culminated in an operational climate where the most substantial high profile transgression over fifteen months was the Koran shooting incident in May 2008.⁵⁹

During protracted COIN operations, all members of the military must conduct planning and mission execution with an eye toward the long-term implications of their actions. The U.S. military's conduct, good or bad, significantly affects public opinion during any given conflict. United States forces, therefore, must conduct their operations in accordance with the tenets and principles of international law. As the commander's primary advisors on international law and the primary trainers on the LoW, Op Law JAs are critical to ensuring this compliance. As part of their mission, Op Law JAs must also incorporate lessons learned from transgressions into future training and planning to

corresponding graphs show U.S. public opinion held steady with a small rise during XVIII ABN Corps's deployment in Iraq. This is opposed to the sharp jump in negative views of the Iraq war following the revelations in early May 2004 of the abuses at the Abu Ghraib prison and the subsequent details and pictures of the story continuing to come out during June and July of 2004.

⁵⁷ In particular, XVIII ABN Corps Op Law JAs had two legal frameworks at separate times during their deployment: (1) the UNSCR 1790, which contained a broad operating authority; and (2) the SA.

⁵⁸ These earlier high-profile incidents had already been absorbed by both commanders and Soldiers across the military. As a result, individuals across the military understood that Law of War (LoW) violations could have profound impacts across the war effort.

⁵⁹ *Bush Apologizes to Iraqi PM over Koran Shooting*, REUTERS, May 20, 2008, available at <http://www.reuters.com/article/topNews/idUSL2011677820080520>. The incident involved a U.S. Army staff sergeant who found a discarded Koran and then used it for marksmanship practice. The Soldier drew a 1 x 1 inch square on the Koran before using the Koran as a target. When the Soldier was finished, he placed the Koran in a pile of other garbage. When local Iraqis discovered the Koran, they were understandably upset. The Brigade commander responsible for the area moved quickly to address the situation by personally and formally apologizing to the town's religious and secular leadership and presenting the town with a new Koran. The town's leadership publicly accepted the apology and acknowledged that the actions of the Soldier did not represent the U.S. Army's attitudes or opinions. Although the major strategic incident that occurred during the XVIII ABC tour in Iraq was the Koran shooting incident described above, the Iraq war provided several examples of how a COIN operation requires focus on the long term strategic implications of actions by servicemembers. See Michael Getler, *The Images Are Getting Darker*, WASH. POST, May 9, 2004, available at <http://www.washingtonpost.com/ac2/wp-dyn/A11271-2004May8>.

prevent recurrences that might jeopardize U.S. efforts in a COIN campaign.

III. In the Heat of Battle—Operational Law Within the Stages of Counterinsurgency

*"The focus of COIN operations generally progresses through three indistinct stages that can be envisioned with a medical analogy: stop the bleeding, inpatient care—recovery, outpatient care—movement to self-sufficiency."*⁶⁰

Long-term success in COIN depends largely on winning the support of the people within a nation-state.⁶¹ Self-sustaining security is achieved by shifting public sentiment from support for the insurgent force and apathy toward the government, to a view of contempt toward the insurgent force and recognition of the benefits of a self-reliant, stable government.⁶² The means of achieving this long-term success in COIN conflicts throughout history have followed a fairly consistent pattern, as described in the medical analogy quoted above.⁶³

Operational Law JAs make important contributions in all three stages of COIN operations examined in further detail below—"stop the bleeding," "inpatient care—recovery," and "outpatient care—movement to self-sufficiency"⁶⁴—that contribute to a secure, stable, and self-sufficient society. In the last stage, the article will focus in particular on the bilateral security agreement (SA) between the Government of Iraq and the United States after the expiration of the UNSCR. A historical perspective of XVIII ABN Corps handling of operations in Iraq can serve as a starting point for all Op Law JAs in future COIN missions.

A. Stop the Bleeding

*"In a COIN environment, it is vital for commanders to adopt appropriate and measured levels of force and apply that force precisely so that it accomplishes the mission without causing unnecessary loss of life or suffering."*⁶⁵

The goal during the initial stages in a COIN struggle is to stop the insurgent force from attacking the civilian population and the national government.⁶⁶ Though this

⁶⁰ FM 3-24, *supra* note 2, at 5-2.

⁶¹ *Id.* at 5-1; *see also id.* at 1-24.

⁶² *Id.* at 5-1.

⁶³ *Id.* at 5-2.

⁶⁴ *Id.*

⁶⁵ *Id.* at 1-25.

⁶⁶ In Iraq, the insurgents focused on defining power between the major ethnic groups of Sunni, Shia, and Kurdish people. This led to attacks against both ordinary civilians and instruments of the national government's

objective appears relatively straightforward, it is a critical and difficult task for commanders to undertake. The difficulty lies in the requirement for the COIN force to distinguish between non-combatants and enemy forces who invariably seek to hide among the civilian population.⁶⁷ Commanders must significantly decrease violence while setting the stage for future engagement by not alienating the civilian population through the use of overly harsh tactics.⁶⁸ This leaves commanders in the near-impossible position of trying to protect their Soldiers and engage the enemy while at the same time avoiding unnecessary civilian casualties with either decision possible having deadly consequences.⁶⁹ While civilian casualties are a concern in all conflicts, in a COIN environment they are exacerbated by the fact that these casualties undercut the COIN forces ultimate goals.

A COIN fight during the stop-the-bleeding phase can have so many moving parts that, at the macro scale, an observer might conclude the fight is too chaotic to be contained or to have the insurgency reversed. However, at the micro scale, tactical battlespace owners typically have a good handle on the threat in their areas and may just need sufficient intelligence to find, fix, and finish the enemy. Solutions are local, and like eating an elephant, COIN must be won bite by bite. The removal by destruction or capture of one smuggling network or insurgent group, or the defeat of an enemy tactic, technique, or procedure, can have profound ripple effects,⁷⁰ although offensive pressure must be maintained. Military forces must apply finite resources to tactical challenges in order to reduce threats while increasing popular support.

Operational Law JAs play a central role in shaping how commanders conduct this violent stage of a COIN operation. The LoW principle of proportionality is the watchword for operations as commanders struggle to engage an enemy deeply rooted within the civilian populace they are trying to

power. In other insurgencies, the focus of insurgent operations may be on degrading the instruments of government power rather than focusing on ordinary civilians.

⁶⁷ FM 3-24, *supra* note 2; *see also id.* at E-1 (discussing the negative impacts resulting from using air strikes that produce civilian casualties). In Iraq, one such example was individuals who were paid to plant a roadside improvised explosive device (IED) at night, but in the day time were ordinary farmers.

⁶⁸ *Id.* at 7-5.

⁶⁹ The commanders dilemma was succinctly summed up in 1837 by the British General Charles James Napier, who stated after being “confronted by a mob his thoughts ‘dwell upon the . . . most interesting question, shall I be shot for my forbearance by a court-martial, or hanged for over zeal by a jury?’” *See TOWNSHEND, supra* note 11, at 20.

⁷⁰ In Iraq the insurgency was supported by smuggling networks which both funded and armed the insurgents. These networks were often interconnected with loose ties connecting wide ranging actors across Iraq. When one element of a network was shut down it affected operations throughout the network as either weapons or money to pay insurgents to continue fighting would be unavailable.

win over.⁷¹ Judge advocates help U.S. forces use the proportionate level of force by continuously monitoring, assessing, and guiding the application of existing and new ROE, EOF procedures, and rules for the use of force (RUF).⁷² More specifically, JAs advise commanders to use ROE, EOF, and RUF as tools to accept more risk in order to prevent unnecessary harm to the civilian population in order to further the overall strategic goal of gaining support from the host nation. It should be noted that commanders at various levels may be unwilling to approve of such restraints on the use of force because of the corresponding risk it places on servicemembers; however, JAs should advise commanders that in a COIN operation, the endgame may necessitate the acceptance of additional risk during the initial phases of the operation.⁷³ By refining the ROE, EOF, and RUF and pushing them to the lowest levels, Op Law JAs help U.S. forces demonstrate their commitment to the measured use of lethal force. This commitment is critical to winning the support of the local population and to COIN strategy during this phase of operations.⁷⁴

The push to move past the bleeding stage often means adjusting priorities. Coming into Iraq at the tail end of the

⁷¹ U.S. DEP’T ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 19 (July 1956) (defining proportionality as the anticipated loss of life and damage to property incidental to attacks must not be excessive in relation to the military advantage gained). *See also* Geneva Conventions Relative to the Treatment of Civilian Persons in Time of War art. 147, Aug. 12, 1949, 75 U.N.T.S. 287.

⁷² During the many rules of engagement (ROE), escalation of force (EOF), and rules of the use of force (RUF) briefings and training sessions given by the XVIII ABN Corps Op Law Division, Op Law JAs noticed a misconception by servicemembers that ROE, EOF, and RUF are intended to restrict their actions on the battlefield. The XVIII ABN Corps Op Law JAs attempted to change the perception by reminding servicemembers that ROE and RUF did not, in any way, restrict an ability to take action in self-defense. In addition, XVIII ABN Corps Op Law JAs attempted to frame EOF as a threat assessment technique as opposed to a gradual and increasing approach to engagements. In other words, instead of looking at EOF as a series of steps a servicemember must go through before engaging the enemy, servicemembers should look at EOF as a tool they can use to clarify an ambiguous threat (i.e., if a servicemember knows something is a threat they may engage and not fire warning shots first; however, if the circumstances are not clear, a servicemember may use EOF measures like non-lethal munitions to help clarify the existence of a threat).

⁷³ Commanders on the street may not want to risk harm to their Soldiers for what they may see as objectives that are echelons above them. However, it is important for two reasons; the first is that for every civilian killed unnecessarily COIN forces give reasons for other civilians to take up arms ultimately increasing the threat to that commander’s Soldiers. The second reason is that commanders must be made aware that the decisions made echelons above them seek overarching goals that may unfortunately increase risk at lower levels. As Op Law JAs, it is incumbent upon us to make this argument and convince those putting their lives at risk that the reasons are legitimate and necessary because when commanders don’t accept the rationale for restrictive ROE then neither will their Soldiers. This argument was easier to make during XVIII ABN Corps’s deployment as operating areas where COIN principles were effectively practiced before the “Surge” between 2003 to 2006 had significantly less violence.

⁷⁴ FM 3-24, *supra* note 2, at 1-25.

surge strategy,⁷⁵ XVIII ABN Corps witnessed the ending of the bleeding stage as violence in Iraq remained at over 350 attacks per week and spiked during the Corps's initial few months in theater to over 700 per week in March 2008 until falling to fewer than 150 attacks per week by April 2009 as the Corps redeployed.⁷⁶ The change in the operating environment during this stage as attacks spiked and then began dropping meant that planners had to refocus operations to adjust to the changing battlefield. Multi-National Corps–Iraq accomplished this in a number of ways, including a focus on winnowing out the remaining bad actors who had enmeshed themselves in the population and were still committed to violence.⁷⁷ Coalition forces focused during this stage on sustaining the security gains achieved through the surge strategy by proactively preventing insurgent groups from committing violent acts instead of reacting to the daily violence that preceded the surge.⁷⁸ In addition, planners also sought to prevent insurgent forces from regaining strength by addressing the underlying causes of violence in Iraq.⁷⁹

⁷⁵ See Bush, State of the Union Address, *supra* note 22; see also Duffy, *supra* note 23.

⁷⁶ U.S. DEP'T OF DEF., REPORT TO CONGRESS, MEASURING SECURITY AND STABILITY IN IRAQ (June 2009) [hereinafter U.S. DEP'T OF DEF., REPORT TO CONGRESS, MEASURING SECURITY AND STABILITY IN IRAQ], available at

http://www.defenselink.mil/pubs/pdfs/9010_Report_to_CongressJul09.pdf.

⁷⁷ Interview with Major Mark M. Turner, U.S. Army, MNC–I C3 Future Operations Planner, at Camp Victory, Iraq (Mar. 2008). In order to explain this new challenge and the apparent aberration of continued violence despite the previous successes of coalition forces, Major Turner commented that, “We’ve removed most of the less capable bad guys as a threat. Those that remain are generally smart, deadly, and know how to survive or they’re just plain lucky.”

⁷⁸ Interview with Major Jeremy Willingham, U.S. Army, MNC–I C3 Future Operations Planner, at Camp Victory, Iraq (Mar. 2008). Major Willingham referred to this as the “whack-a-mole” strategy. As soon as an insurgent group popped up in a new location, coalition forces could now focus their efforts specifically on that group. As violence decreased across Iraq because of the successful surge strategy, insurgent groups attempted to shift operations into an area where there was less of a coalition force presence. However when these groups shifted to a new area they were often the only group operating in that particular battlespace making it easier for coalition forces to focus efforts on that particular group.

⁷⁹ These underlying problems, which XVIII ABN Corps sought to address during our time in Iraq, were neatly summed up by General Raymond T. Odierno, who replaced General Petraeus as the Commander of MNF–I on 16 September 2008. General Odierno stated during his testimony before the House Armed Services Committee on 30 September 2009,

In Iraq, much of the struggles are about power, land and resources which is reflective in the Arab-Kurd and GoI-KRG [Government of Iraq – Kurdistan Regional Government] tensions. The key issues include the pending hydrocarbon law, revenue sharing, and the disputed internal boundaries (DIBs) including areas in Ninawa and Diyala provinces and Kirkuk.

See House Armed Services Committee, The Status of Ongoing U.S. Efforts in Iraq (statement of General Raymond T. Odierno, U.S. Army, Commander, MNF–I) (Sept. 30 2009), available at http://armedservices.house.gov/pdfs/FC093009/Odierno_Testimony093009F.pdf.

During this phase, MNC–I Op Law JAs began reviewing the ROE with the intent of making all necessary changes during the publication of MNC–I Operations Order (OPORD) 08-02.⁸⁰ The intent was to convey to commanders as much authority for mission accomplishment as possible while at the same time avoiding excessive loss of civilian life. To help the continuing surge strategy, the MNC–I Op Law JAs attempted to find a way to precisely kill the enemy while minimizing collateral damage to civilians. Part of the analysis included changing approval and notifications requirements to better synchronize the overall strategic objective throughout the different levels of command.⁸¹ This allowed commanders to leverage the increased troop strength during the surge strategy in order to focus on enemy insurgents as they surfaced throughout the country.

1. Multi-National Coalitions in COIN—A Necessary Complexity for U.S. Forces

“They (the Americans) are, I think, a bit unwarrantably cock-a-hoop as a result of their limited experience to date. But they are setting about it in a realistic and business-like way. . . . I have a feeling that they will do it”⁸²

In modern warfare, for both political and economic reasons, it helps to share the burden of conflict across a multi-national coalition of partnered nations. However, while multi-national partners may share the same mission, they often operate under different ROE and home-country policies; even political sensitivities may differ among partners.⁸³ While a multi-national coalition may increase the overall effectiveness of a given operation, the challenge for coalition partners is to overcome their differences to forge an effective fighting force.

Operational Law JAs are indispensable when working with military and civilian forces from friendly nations. Operational Law JAs synchronize efforts across different legal systems, different types of command relationships, and different regulations to ensure a cohesive fighting force. Op Law JAs must be proactive in identifying possible fracture points with foreign partners to ensure that once on the battlefield the commander can trust that there will be mission accomplishment whether he is utilizing U.S. or a foreign partner’s resources.

⁸⁰ See generally FM 5-0, *supra* note 18, at G-5.

⁸¹ See *id.* at G-6.

⁸² Air Vice-Marshall Sir John Slessor, Royal Air Force. Though Vice-Marshall Slessor was referring to allied air operations against Germany during World War II, the sentiment of the quote encapsulating British servicemembers feelings towards their American counterparts rang true in Iraq during Operation Iraqi Freedom, *See AIR POWER THEORY AND PRACTICE* 119 (John Gooch ed., 1995).

⁸³ FM 3-24, *supra* note 2, at 2-24.

During this phase, XVIII ABN Corps created and deployed two separate Tactical Command Posts (TACs) in Basra. The MNC-I Commander created these TACs to reinforce Prime Minister Nouri al-Maliki's faltering "Charge of the Knights" offensive against various Shiite insurgent and criminal groups who, at the time, controlled the city of two million.⁸⁴ Multi-National Corps-Iraq rushed U.S. Marines from the 24th Marine Expeditionary Unit and Army paratroopers from the 82d Airborne Division to embed with Iraqi combat units to provide additional firepower, intelligence, and logistics assets to support the offensive.⁸⁵ The Basra operation also served as the template for future MNC-I operations led by Iraqis with U.S. forces in support.⁸⁶ The template proved successful during operations in Sadr City and Maysan province, which resulted in a sharp decline in Shiite insurgent group attacks.⁸⁷

Multi-National Corps-Iraq assigned one JA to each of the two TACs in Basra. These JAs played a leading role in interpreting ROE for embedded U.S. Soldiers and Marines and helped U.S. forces tread the fine line between British expectations as battlespace owners in Multi-National Division-South East (MND-SE)⁸⁸ and Iraqi expectations as the greatest combat force during the operations. Ultimately, the firepower of U.S. forces following U.S. ROE, helped to tactically overwhelm the enemy and decimate the enemy's senior leadership in Basra within a matter weeks.⁸⁹

⁸⁴ See Karen DeYoung et al., *U.S. Appears to Take Lead in Fighting in Baghdad: U.S. Forces Battle Mahdi Army in Sadr City, Aircraft Target Basra*, WASH. POST, Apr. 1, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/01/AR2008040100833.html>. Because of the kinetic nature of the fight in Basra, the XVIII ABN Corps desired to have a JA present on the ground to advise the on-scene commander of the legality of kinetic strikes and offensive operations. Once present, the XVIII ABN Corps JA became much more than a legal advisor to the tactical assault commander. A de facto executive officer, the XVIII ABN Corps JA advised the tactical commander of the diplomatic sensitivities of operating among the British and Iraqi forces, provided solutions for the problems with incompatibility between the U.S. and British communication network and filled gaps that existed between the U.S. and British ROE when U.S. forces operated among U.K. servicemembers.

⁸⁵ See *id.*; see also *Iraq Forces Battle Basra's Militia's*, BBC, Mar. 26, 2008; available at http://news.bbc.co.uk/2/hi/middle_east/7312078.stm.

⁸⁶ During the XVIII ABN Corps tenure in Iraq, the MNC-I Commander directed that operations shift from coalition force centric toward operations conducted by, with, and through the Iraqi security forces; see *infra* note 119.

⁸⁷ U.S. DEPT' OF DEF., REPORT TO CONGRESS, MEASURING SECURITY AND STABILITY IN IRAQ (June 2008), available at http://www.defenselink.mil/pubs/pdfs/Master_16_June_08_%20FINAL_SIGNED%20.pdf.

⁸⁸ As one of the members of the coalition, British forces were given military responsibility for the entirety of MND-SE in the aftermath of the 2003 invasion of Iraq. All coalition forces in the area reported to the British divisional commander. When U.S. forces went down to Basra as a separate element in March of 2008, U.S. forces had to achieve mission objectives without stepping in the lane of British operations. See also *supra* note 50 (listing coalition forces).

⁸⁹ See James Glanz & Michael Kamber, *Shiite Muslims Cling to Swaths of Basra and Stage Raids*, N.Y. TIMES, Mar. 30, 2008, available at <http://www.nytimes.com/2008/03/30/world/middleeast/30iraq.html>.

As a result of the successful employment of Op Law JAs at the two TACs, one Op Law JA remained in Basra to assist in the international effort.⁹⁰ The Op Law JAs in Basra helped U.S. forces work through the United Kingdom's (U.K.) forces separate communications systems, political realities, and methods of accomplishing the mission.⁹¹ For example, MNC-I JAs worked with their British counterparts to develop techniques to transfer data and information between incompatible U.S. and British systems.⁹² These Op Law JAs also created a process, approved at the U.S. and U.K. national levels, to facilitate the processing of detainees obtained within the British battlespace, which was necessary because of legal and political barriers for British forces in the area of detention operations.⁹³

⁹⁰ An Op Law JA remained continuously in Basra for a period of thirteen months from the beginning of the Battle of Basra until just a few weeks before XVIII ABN Corps left theater. The JAs in Basra were rotated after various length stays between two months and five months.

⁹¹ These issues were presaged by military thinkers such as Carl Von Clausewitz, "

It is traditional . . . for states to make offensive and defensive pacts for mutual support—though not to the point of fully espousing one another's interests and quarrels. Regardless of the purpose of the war or the scale of the enemy's exertions, they pledge each other in advance to contribute a fixed and usually modest force. . . . It would all be tidier . . . if the contingent promised . . . were placed entirely at the ally's disposal and he were free to use it as he wished. It would then in effect be a hired force. But that is far from what really happens. The auxiliary force usually operates under its own commander; he is dependent only on his own government, and the objective the latter sets him will be as ambiguous as its aims. . . . The affair is more often like a business deal. In the light of the risks he expects and dividend he hopes for, each will invest about 30,000 to 40,000 men and behave as if that were all he stood to lose. . . . Even when both share a major interest, action is clogged with diplomatic reservations, and as a rule the negotiators only pledge a small and limited contingent.

See CARL VON CLAUSEWITZ, ON WAR, *supra* note 9, at 603.

⁹² By working through both C6 at MNC-I and the communications help desks in Basra, Op Law JAs assisted in the transfer of electronic documents from staff sections in MND-SE to their counterparts at MNC-I and in the other multi-national divisions. Op Law JAs were utilized in this manner because of their overall understanding of operations in Iraq and their wide ranging contacts with the staff at MNC-I.

⁹³ British detention operations in Iraq have been the subject of extensive scrutiny and litigation. Two leading cases were litigated to the U.K. House of Lords (the U.K.'s Supreme Court) in 2007 on the issue of detention in Iraq. See *Al-Skeini et al. v. Sec'y of State for Defence* UKHL 26 (2007) available at <http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd070613/skeini-1.pdf>; *Al-Jedda R. on the application of Al-Jedda v. Sec'y of State for Defence* UKHL 58 (2007), available at <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd071212/jedda-1.htm>. The issue in *Al-Skeini* was the extent of U.K. human rights law protections enjoyed by Iraqi citizens as a result of British military operations in Iraq. The court found that U.K. human rights law did not apply to the vast majority of Iraqis. However, the court held that detainees held by the British military were in a special position; determining that U.K. human rights law protected them. The reason for the distinction can be found in article 1 of the European Convention of Human Rights (ECHR)

It bears mentioning that the integration between the U.S. and international forces is largely personality driven. Those responsible for selecting the JAs who will act as liaisons to other coalition or multi-national forces should carefully pick individuals who are open-minded, flexible, and patient. In order to gain the maximum amount of productivity, the attorneys should be creative and adaptive in determining how to achieve overall mission objectives within the cultural and political parameters of the international force. For example, the MNC-I Op Law JAs who were assigned to Basra were only intended to act as liaisons to the British legal section; however, because they built a relationship of trust based on their willingness to comport with British military customs and culture, these liaisons took on a much larger role and became valued assets to the British military commanders in MND-SE.

2. Sowing the Seeds of Goodwill with the Host Nation Population—The Foundation of A Successful COIN

“The conduct of a general in a conquered country is encompassed with difficulties. If he is severe, he exasperates and increases the number of his enemies.”⁹⁴

Part of the challenge in COIN operations during the initial phase is the need to understand and determine what is important to the host nation’s citizens so as to engender good will.⁹⁵ To build rapport and incur support from the local populace while promoting legitimacy within the host nation’s government, COIN forces must recognize and respect the cultural sensitivities of the host population. Counterinsurgency forces that make this effort help weaken the insurgency by contradicting the insurgents’ message that the government is illegitimate and the only way for the

which is given effect statutorily in the United Kingdom through the mechanism of the Human Rights Act 1998 (a statute of the U.K. Parliament). Article 1 of the ECHR says that it applies to those persons who fall within the jurisdiction of a high contracting party. In contrast, article 2 of the International Covenant on Civil and Political Rights (ICCPR) (ratified by the United States in 1992) restricts the ICCPR’s application to the territory of the party state. This is a significant distinction. The ICCPR only has legal effect on U.S. soil while the United Kingdom is legally bound to protect the human rights of any person who falls within U.K. jurisdiction wherever they might be in the world. The court in *Al-Skeini* accepted that a person held in a British detention facility must be under U.K. jurisdiction. The *Al-Jedda* case accepted that military detention might be lawful where it was carried out under the authority of an UNSCR (as was the case in Iraq). This was due to the effect of article 103 of the U.N. Charter, which overrides other international agreements (i.e. the ECHR in this instance). However, the *Al-Jedda* Court cautioned that ECHR rights were merely ‘qualified’ and not ‘displaced.’ Interviews with Lieutenant Colonel Nigel Heppenstall, U.K. Army, LEGAD, British Exchange Officer Legal, Ctr. for Law and Military Operations, The Judge Advocate Gen.’s Legal Ctr. & Sch. (Oct.–Nov. 2009).

⁹⁴ NAPOLEON BONAPARTE, MAXIMS OF WAR (1820). See COLONEL MICHAEL B. CARGROVE, DISTANT VOICES: LEARNING FROM LEADERS PAST 17 (iUniverse Books 2005).

⁹⁵ FM 3-24, *supra* note 2, at 1-21.

population to secure their rights is by supporting the violence of the insurgency either actively or tacitly.⁹⁶

Operational Law JAs can be invaluable to understanding cultural sensitivities and creating legal solutions to achieve a commander’s desired effect. By understanding the legal realities within a host nation, Op Law JAs can help tailor the actions of U.S. forces to have less of an impact on the civilian populace. This role can vary from understanding host nation laws⁹⁷ to helping change U.S. doctrine so that servicemembers’ actions conform better with a host nation’s cultural sensitivities.

For XVIII ABN Corps the effort to minimize U.S. effects in Iraq became paramount during this stage. The Government of Iraq, due to political considerations, was under pressure to end the U.S. presence after six years of U.S. forces in Iraq.⁹⁸ The activities of U.S. forces also created difficulties because of the outcome of certain operations during the summer of 2008 that added to the calls to end the U.S. presence in Iraq.⁹⁹

Multi-National Corps–Iraq worked to engender good will with Iraqi civilians during the stop-the-bleeding stage; Op Law JAs assisted in the development of layered restraints on operations. These restraints were put in place for religiously or culturally sensitive areas. Operational Law JAs also created layered restraints by adjusting approval levels for ordinary operations and placing guidance regarding these restraints directly into the ROE and MNC-I’s standard operating procedures (SOP).¹⁰⁰ These restraints, when instituted at lower levels of command, were further refined to adjust for local differences within Iraq’s population. By attempting to minimize the disturbances

⁹⁶ Where a government has come into power through some form of popular vote, fraudulent or not, and maintains at least an appearance of constitutional legality, the guerrilla outbreak cannot be promoted, since the possibilities of peaceful struggle have not yet been exhausted. See BRYAN LOVEMAN & THOMAS M. DAVIES JR., GUERRILLA WARFARE 48 (Univ. of Neb. Press 1997) (1985) (quoting Che Guevara).

⁹⁷ For example, Op Law JAs throughout Iraq were required to train servicemembers that an Iraqi citizen carrying an AK-47 was not necessarily an enemy insurgent. Iraqi law permits Iraqi citizens to own and possess an AK-47. Therefore, not all individuals with that weapon type posed an immediate threat to U.S. forces and targeting them would not be justified under the existing ROE. See Coalition Provisional Authority, No. 3 (2003) (Iraq); Law of Arms, No. 13 (1992) (Iraq); Law of Arms No. 15 (2000) (Iraq).

⁹⁸ See Campbell Robertson, *Iraqi Officials Still Insisting on Withdrawal Timetable*, N.Y. TIMES, July 9, 2008, available at <http://www.nytimes.com/2008/07/09/world/middleeast/09iraq.html>.

⁹⁹ See Richard A. Oppel Jr. & Ali Hameed, *U.S. Forces Kill Relatives of Iraqi Governor*, N.Y. TIMES, July 21, 2008, available at <http://www.nytimes.com/2008/07/21/world/middleeast/21iraq.html>. See also *supra* note 59 (discussing the Koran shooting incident and Abu Ghraib and additional examples of events that provided opposition to U.S. forces in Iraq).

¹⁰⁰ An example of this could be seen in the effort to have female detainees only searched by female servicemembers to help comply with Islamic customs of propriety.

U.S. forces created, Op Law JAs helped decrease civilian anger over U.S. activities.¹⁰¹

Another legal change that reflected the evolving COIN fight was MNC-I's decision to redefine EOF procedures. Suspecting that the enemy was trying to exploit EOF incidents that resulted in civilian casualties, the Op Law Division reexamined how U.S. forces conducted EOF procedures with the goal of reducing the number of serious EOF incidents. Additionally, reducing the number of EOF incidents resulting in death or serious injury emphasized the COIN principle of working alongside the Iraqi citizenry while helping to remove the counterproductive stigma of an occupation force.

A theater-wide assessment concluded that servicemembers were regularly engaging local national vehicles that were driving too closely to convoys, regardless of local threat conditions. Multi-National Corps-Iraq Op Law JAs, working with other staff sections, conducted a review of historic enemy attack data on Iraqi roads while keeping in mind local Iraqi driving habits. Based on this analysis and in coordination with the MNC-I Commander, Op Law JAs developed a "Share the Road" EOF policy.¹⁰² Under this policy, U.S. forces were to permit Iraqi local nationals to travel in and among U.S. convoys when practicable under local conditions. If necessary, U.S. forces would employ non-lethal measures in response to a developing but ambiguous threat situation. Finally, servicemembers were expected to use intelligence of the operating area to shape their responses to various ambiguous threat situations.¹⁰³

The stop the bleeding stage of a COIN operation is an intense fight requiring flexibility on the part of commanders and staff sections.¹⁰⁴ An Op Law Division can provide tangible results to a commander during this phase by creating targeted restraints on the use of force, crafting ROE mindful of cultural and religious sensitivities, providing operational approval guidelines, and giving real-time legal

¹⁰¹ An example of this was the policy of U.S. forces avoiding entry into mosques, which was reported as far back as 2004. This policy was put in place to avoid inflaming Iraqi views of Americans as crusaders. See John F. Burns et al., *U.S. Soldier Is Killed as Helicopter Is Shot Down in Iraq*, N.Y. TIMES, Jan. 3, 2004, available at <http://www.nytimes.com/2004/01/03/world/us-soldier-is-killed-as-helicopter-is-shot-down-in-iraq.html>.

¹⁰² See Policy Letter, Headquarters, Multi-National Corps-Iraq, Lieutenant General Lloyd J. Austin III, U.S. Army, subject: Employing Escalation of Force (EoF) TTPs (May 2008) (June 9, 2008); see also MNC-I OPORD 09-01(U) (1 Jan. 2009), at tab K to app. 11 (escalation of force) to annex C (operations) (document is classified Secret).

¹⁰³ In addition, Op Law JAs created a training packet developed in coordination with various MNC-I staff sections to go with the MNC-I Commander's guidance. This training packet explained how and when to use non-lethal munitions. Using vignette-based scenarios, the packet helped servicemembers test their understanding of threat-based employment of EOF procedures.

¹⁰⁴ FM 3-24, *supra* note 2, at 5-2.

advice to commanders conducting offensive operations. Though every COIN is different, all Op Law JAs should consider utilizing these tools during the initial stage of a COIN operation.

B. Inpatient Care—Recovery

*"Do not try to do too much with your own hands. Better the Arabs do it tolerably than that you do it perfectly. It is their war, and you are to help them, not to win it for them. Actually, also, under the very odd conditions of Arabia, your practical work will not be as good as, perhaps, you think it is."*¹⁰⁵

In COIN doctrine, the focus throughout this stage of operations is to establish the foundation for long-term stability.¹⁰⁶ Once the volume of attacks recedes as a result of COIN efforts during the outpatient care phase, the COIN force should focus on establishing and expanding the host nation's security forces, developing civil capacity, and spurring economic growth.¹⁰⁷ Success in this stage depends largely on COIN forces taking advantage of the decrease in violence. As at any point during a COIN campaign, success can be tenuous. The efforts of COIN practitioners can quickly slip back into just trying to control the violence if gains are not made during the inpatient care stage.

During the inpatient care phase, the traditional structure of an OSJA is stretched to meet all of the commander's mission requirements in a COIN struggle.¹⁰⁸ Operational Law JAs should be prepared to expand their practice outside the kinetic focus of conventional armed conflict into areas that include local host nation laws, economic or fiscal considerations, and working closely with civilian organizations, including non-governmental organizations and entities within the U.S. Government.¹⁰⁹ Operational Law JAs can help commanders take advantage of the decrease in violence with three particular objectives: (1) shifting the focus from kinetic, U.S. forces-centered operations to civil capacity, host nation-centered operations; (2) expanding the emphasis on rule of law; and (3) leveraging the expertise of civilian organizations.

¹⁰⁵ T. E. Lawrence, *27 Articles*, ARAB BULL., Aug. 20, 1917, art. 15.

¹⁰⁶ FM 3-24, *supra* note 2, at 5-2.

¹⁰⁷ *Id.* at 5-2.

¹⁰⁸ See FM 1-04, *supra* note 20, at 5-1. Field Manual 1-04 promulgates the doctrine that governs the roles and responsibilities of JAs. Rule of law though provided for in FM 1-04, does not constitute a core legal discipline for JAs; therefore, OSJAs generally do not include a Rule of Law Division. The XVIII ABN Corps OSJA team provided information and direct accounts of the COIN in Iraq to the Center for Legal and Military Operations (CLAMO), which influenced the *Rule of Law Handbook*.

¹⁰⁹ At various times during our deployment Op Law JAs worked with representatives from the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the U.S. Department of State, the United Nations (U.N.), and the International Committee of the Red Cross (ICRC) among many others.

During the course of XVIII ABN Corps's deployment, the COIN fight moved into the inpatient care stage as the Government of Iraq gained increased legitimacy after successful campaigns in Basra and Sadr City.¹¹⁰ This phase occupied the longest part of XVIII ABN Corps's deployment. Attacks continued to decrease from their highest points, and Coalition forces repositioned themselves to focus more closely on stability operations.¹¹¹

As the operational face of the OSJA, Op Law JAs often found themselves involved in issues that were outside of a traditional Op Law context. Op Law JAs answered questions from all over theater and within the MNC-I staff sections involving Iraqi constitutional issues, Iraqi law questions, and fiscal subjects. Iraqi law questions became paramount as commanders at all levels began to focus on defining and quantifying success in rule of law operations throughout Iraq. It was during this stage, partly as a response to these novel and challenging issues, that the Op Law Division was divided into two separate sections: the Op Law Division, which handled traditional operational law issues, and a completely separate Rule of Law Division.¹¹²

1. Civil Considerations in a COIN

*"COIN operations require a greater focus on civil considerations . . . than conventional operations do."*¹¹³

The shift from military-specific to civilian-related objectives is critical as violence decreases and essential services increase, resulting in the host nation's government gaining legitimacy.¹¹⁴ Counterinsurgency forces must provide the impetus and the direction to achieve this shift in focus by ensuring that the host nation's government and security forces follow its lead. Commanders must be creative in finding incremental ways to transition the burdens of the COIN fight to the host nation without creating too much strain on the government's limited resources or its newly trained security forces.¹¹⁵

Judge advocates, particularly Op Law JAs, are uniquely suited to assist commanders during this stage of a COIN

¹¹⁰ The operation in Basra named "Charge of the Knights" started on 25 March 2008. Operations in Sadr City were given the overall name of "The Battle for Sadr City" these operations picked up intensity following the heavy bombardment, by motors and rockets, of the Green Zone (also known as the International Zone) in Baghdad on 25 March 2008. The effectiveness of these operations was borne out in later operations in Amarah where MNC-I received no major resistance while clearing the city of insurgents.

¹¹¹ See *supra* note 76.

¹¹² See *supra* Part III.B.2 (providing a more detailed discussion on the development of the Rule of Law Division).

¹¹³ FM 3-24, *supra* note 2, at 4-6.

¹¹⁴ *Id.* at 5-2 to 5-3.

¹¹⁵ *Id.* at 5-3.

operation, often acting as a force multiplier.¹¹⁶ Specifically, JAs are familiar with the rules, regulations, and laws governing disciplines across the spectrum of military operations.¹¹⁷ This knowledge allows JAs to analyze host nation laws and utilize U.S. federal statutes and military regulations to train servicemembers on the legal considerations necessary to operate within a COIN during the inpatient care stage. Additionally, JAs can assist the commander's rule of law objectives by creating programs which strengthen judicial institutions and promote governmental legitimacy through interactions with legal and political professionals.¹¹⁸

Stability operations during this phase can prove to be as difficult as traditional kinetic operations. To ease this burden, the MNC-I commander early in XVIII ABN Corps's deployment began the transition from U.S.-led kinetic operations to operations in which Iraqis were in the lead. He advised his staff and all leaders under his command that operations should be conducted "by, with, and through" the Iraqis.¹¹⁹ In accordance with this guidance, every operation was to use Iraqi forces, Iraqi guns, and Iraqi money as much as possible. This approach, which became the mantra for all staff sections and planners, pushed units to conduct operations with their Iraqi counterparts and reduce unilateral operations. Though this doctrine made the execution of operations more difficult in the short term, it furthered the ultimate goal of MNC-I's COIN strategy.

As MNC-I shifted focus to stability and civil capacity operations, commanders in the field were forced to deal with the reality that their units dedicated to kinetic war fighting were increasingly needed in supporting roles and would less frequently be the primary actors in operations. Instead,

¹¹⁶ An example of this from MNC-I can be seen in the desire of U.S. commanders to allow Iraqi forces to ride in U.S. vehicles thereby allowing more combat troops get to an area of operations. Judge advocates worked to find an answer that was compatible with both U.S. statutes and military regulations ultimately concluding that Iraqis could ride in U.S. vehicles as necessary and under certain circumstances.

¹¹⁷ See generally FM 1-04, *supra* note 20, at D-1 to D-4.

¹¹⁸ At the brigade-level this work can entail meeting with local judges and legal professionals. At the corps-level or above it can entail working with institutions and professionals on the level of the U.S. Supreme Court or the American Bar Association Executive Board. In either case, this work can often be as simple as creating informational sessions explaining the usage of forensic evidence.

¹¹⁹ Lieutenant General (LTG) Lloyd Austin III recognized early on that the operating environment in Iraq was moving more and more toward stability based on the security successes gained from the surge strategy. In a proactive effort to bolster the strength and confidence of the Iraqi security forces and in anticipation of Iraq's desire to assert its sovereignty, LTG Austin directed all commanders to accomplish their missions through their Iraqi counterparts. This strategy had the effect of both expressing the U.S. intent to handover the responsibility of securing Iraq to the Iraqis, as well as providing the Iraqi security forces with an opportunity to gain confidence by practicing their military craft alongside trained and skilled members of the U.S. forces. In the end, this strategy not only resulted in the training of the Iraqi security forces, but it also allowed U.S. forces to prepare for expanding Iraqi sovereignty under the SA.

commanders found themselves relying more heavily on units dedicated to stability and civil capacity operations, including engineering units, route clearance teams, and civil affairs teams. Often, following MNC-I's lead and against their training, commanders and staff members had to stand by and allow the Iraqis to decide their own path, utilizing their own style of organization and leadership.¹²⁰

During this phase, JAs created training aids identifying legal issues associated with operating alongside host nation forces for servicemembers to carry in the field.¹²¹ Operational Law JAs also served in a variety of roles such as detention operations experts, interrogation advisors, engineers, executive officers, multi-national force trainers, liaison officers to various coalition forces, and intelligence officers. In one instance, JAs advised the MNC-I Commander which Iraqis, based on their rank and level of authority, would be the appropriate counterpart for U.S. commanders to contact and partner with for decision-making purposes. In order to accomplish this task, Op Law JAs scrutinized the Iraqi Constitution and federal laws in an attempt to determine the appropriate individuals within the Iraqi government and military. These Op Law JAs again contributed to the Corps's overall effort by interpreting both Iraqi and U.S. laws and regulations and by providing reasoned guidance to other members of the force.

Operational Law JA's also used the fragmentary order (FRAGO) and OPORD process to accomplish the MNC-I commander's COIN doctrine.¹²² Since COIN doctrine was heavily emphasized, planners at MNC-I were attuned to writing orders that took these precepts into account. Planners sought out and welcomed Op Law JAs adjusting the focus and direction of orders to more efficiently apply the principles of COIN doctrine.¹²³ To assist staff planners,

Op Law JAs were members of joint planning teams¹²⁴ (JPTs) and helped write parts of OPORD 08-02, which asserted the need for Coalition forces to foster partnerships with the Government of Iraq and the Iraqi security forces.

As the next section will show, by incorporating "by, with, and through" into doctrine, Op Law JAs helped establish the legitimacy of U.S. and host-nation security forces with the populace because these forces were following and respecting local law. By assisting in the FRAGO and OPORD drafting processes, Op Law JAs directly adjusted doctrine, thereby influencing action on the ground. With all that Op Law JAs can achieve during this phase, the one constant is the need to be flexible and ready to adjust to the mercurial legal issues that will arise.

2. Development of Effective Governance

*"The primary objective of any COIN operation is to foster development of effective governance by a legitimate government."*¹²⁵

In COIN operations, fostering development of effective governance is a two-pronged effort. First, the populace must view the efforts of the COIN force as legitimate, and second, the actions of the COIN force must support the efforts of the legitimate government.¹²⁶ Commanders on the ground must utilize both their military and political capabilities to help foster the aims of the legitimate host nation government.¹²⁷ At the corps level, commanders and senior staff must focus on key leader engagements within the host nation's government and security forces.

In maintaining a COIN forces' compliance with international law and norms, Op Law JAs can assist in the overall goal of creating a stable and legitimate host nation government. By ensuring COIN forces operate within the standards of international law, human rights law, and in some cases assisting the commander to add additional restrictions well inside the limits of international law, the citizens of the host nation will be more likely to recognize the legitimacy of the host nation government.¹²⁸ This also

¹²⁰ While the U.S. military follows the military decision making process to address a commander's needs, the Iraqi Army due to its logistical limitations, less established command and control functions, and certain cultural differences arrived at answers to questions that arose on the battlefield in a more improvisatory fashion. While U.S. forces offered advice and doctrinal examples for the Iraqis during this process, the learning that the Iraqis were doing on the battlefield was helping them to establish their own methods for military decision making that suited their military, political, and cultural needs.

¹²¹ See FM 3-24, *supra* note 2, at 5-2.; see also FM 1-04, *supra* note 20, at D-1-D-4.

¹²² See FM 5-0, *supra* note 18, at G-5 to G-6.

¹²³ One such example was the need to create a more restrictive ROE for U.S. forces operating in an area where two local factions had long standing tensions and cultural differences with one another. The MNC-I Commander wanted to re-affirm the U.S. servicemember's right to self-defense, but at the same time wanted to ensure that U.S. forces did not pick a side in the historical power struggle. The MNC-I Op Law JAs had to carefully draft an order that gave commanders on the ground the confidence and flexibility to conduct operations but at the same time provided the necessary restrictions to prevent any marginalization of a cultural sect within Iraqi society.

¹²⁴ See generally FM 5-0, *supra* note 18, at 1-1 to 1-29. At MNC-I, the G-3 used the model of JPTs to accomplish the dynamic and rapid planning cycle required by real world operations. When required, a potential command decision was assigned to a JPT leader who assembled subject matter experts in all of the relevant areas to discuss and develop plausible courses of action for the MNC-I Commander.

¹²⁵ FM 3-24, *supra* note 2, at 1-21.

¹²⁶ *Id.* at 5-2 to 5-3.

¹²⁷ *Id.*

¹²⁸ While the LoW, using the Geneva Conventions as the main body of that law, is a standard that world opinion confers legitimacy and recognizes as complying with the LoW, ultimately it is the population of a host nation that offers legitimacy to the aims of military forces operating on its territory. For instance, a population may expect forces operating on its territory to

entails persuading the host nation's forces conducting COIN operations to comply with the same international laws and norms.

In Iraq, the effort to create an effective government was complicated as a result of the abuses by governmental officials that were taking place in Iraqi prisons.¹²⁹ Allegations of abuse by Iraqi police officers¹³⁰ and rampant corruption within both the national and provincial governments eroded popular trust in Iraqi government institutions.¹³¹ To combat these abuses and corruption, MNC-I utilized resources as varied as civil affairs, psychological operations, and information operations. Multi-National Corps–Iraq also aggressively pushed the use of Police in Transition Teams (PiTTs) and Military in Transition Teams (MiTTs) in an attempt to control security force abuses at local levels.¹³² Multi-National Corps–Iraq also pressed the Government of Iraq to confront the endemic corruption that plagued the Iraqi system.¹³³

follow laws which are more stringent than Geneva's basic protections in order to avoid trampling on what the population views as their rights. Additionally, even within the host nation's population legitimacy for military forces is ultimately about perspective. As an example, if an individual thinks that everyone in a particular sect in the host nation should be killed than the fact that a military force operating in the country doesn't focus operations on eliminating that sect may prevent that individual from viewing that military force as legitimate. To reconcile different perspectives, COIN doctrine by definition seeks to strengthen a legitimate national government while preventing alienation of the population even if this effort may require the military forces to operate in a manner which is more restrictive than the basic protections of the LoW.

¹²⁹ See Erica Goode, *U.N. Urges Iraq to Address Human Rights During Lull*, N.Y. TIMES, Mar. 16, 2008, available at <http://www.nytimes.com/2008/03/19/world/middleeast/19iraq.html>.

¹³⁰ See David Johnston, *U.S. Struggles to Tutor Iraqis in Rule of Law*, N.Y. TIMES, Feb. 16, 2008, available at <http://www.nytimes.com/2008/02/16/world/middleeast/16justice.html>.

¹³¹ See Alissa J. Rubin, *Iraqi Trade Officials Ousted in Corruption Sweep*, N.Y. TIMES, Sept. 23, 2008, available at <http://www.nytimes.com/2008/09/24/world/middleeast/24iraq.html>.

¹³² These MiTTs and PiTTs were initially pushed forward by the Iraq Study Group's findings in December of 2006. Recommendation 57 stated,

Just as U.S. military training teams are imbedded within Iraqi Army units, the current practice of imbedding U.S. police trainers should be expanded and the numbers of civilian training officers increased so that teams can cover all levels of the Iraqi Police Service, including local police stations. These trainers should be obtained from among experienced civilian police executives and supervisors from around the world. These officers would replace the military police personnel currently assigned to training teams.

See James A. Baker, III et al. (James A. Baker, III Inst. for Pub. Pol'y (Dec. 2006), available at http://www.bakerinstitute.org/publications/iraqstudy_group_findings.pdf.

¹³³ See U.S. DEP'T OF DEF., REPORT TO CONGRESS, MEASURING SECURITY AND STABILITY IN IRAQ (Sept. 2008), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA487170&Location=U2&doc=GetTRDoc.pdf>; see also Glenn Kessler, *Ex-Investigator Details Iraqi Corruption*, WASH. POST, Oct. 5, 2007, available at <http://www.washingtonpost.com/wp-dyn/content>

As noted earlier, the MNC–I OSJA decided to create a Rule of Law Division, which operated separate and apart from the Op Law Division, during this phase of operations. This new division consisted of Op Law JAs who had previously provided legal advice and analysis on kinetic operations. The increased emphasis on compliance with Iraqi law, on topics ranging from detention operations to the constitutional question of the prime minister's power to control branches of the security forces or his ability to fire government officials,¹³⁴ necessitated the creation of a division with expertise in Iraqi law and indigenous rule of law institutions. Operational Law JAs whose primary focus was on U.S. kinetic operations could not maintain the knowledge base necessary to continuously answer rule of law questions. As the Rule of Law Division stood-up, Op Law worked hand in hand with rule of law to provide a seamless transition ready to answer all questions coming to the corps legal office from the divisions and staff sections.¹³⁵ During this phase, MNC–I Op Law and rule of law JAs were consulted so frequently to explain various aspects of Iraqi law, it sometimes seemed they were required to be “barred” to practice law in Iraq.¹³⁶

In hindsight, the MNC–I OSJA could have approached the issue of responding to the needs of the COIN campaign in the inpatient care phase differently. The existence of two distinct legal sections resulted in periodic miscommunication. The two independent branch chiefs had slightly different work priorities and mission focus; although JAs within the rule of law and Op Law divisions often worked closely together because many issues did not fit neatly within one section or the other and were best resolved by utilizing the expertise of both of these sections. Operational Law JAs might consider an alternative to deploying with two distinct sections. With extensive pre-deployment preparation and by maintaining the flexibility required to shift priorities and personnel at the proper time, it is possible to deploy with a single Op Law Division under one branch chief and two separate but coexisting teams—a

/article/2007/10/04/AR2007100401305.html.

¹³⁴ See Timothy Williams & Mudhafer al-Husaini, *Iraqi Local Counsel Rejects Premier's Police Appointee*, N.Y. TIMES, Jan. 17, 2009, available at <http://www.nytimes.com/2009/01/18/world/middleeast/18iraq.html>

¹³⁵ This transition meant the Rule of Law Division took over the responsibility for the monthly travel requirement to provide legal training on Iraqi law to MiTTs and PiTTs arriving in Iraq in support of anti-corruption efforts. While at the same time the Op Law Division supported MNC–I's efforts to use MiTTs and PiTTs by providing legal advice to teams in southern Iraq that coordinated with the Op Law JA in Basra. Even after the transition, many rule of law questions continued to come to the Op Law Division because the embedded Op Law JAs within the different staff sections of MNC–I continued to be the face of the OSJA to those staff sections. Over time, as Op Law JAs became more familiar with rule of law by receiving assistance and working with the Rule of Law Division, they were able to answer those questions directly.

¹³⁶ Iraqi lawyers receive bachelor of laws (LL.B.) degrees from a university. The only prerequisites for practicing law in Iraq are a law degree and payment of dues to the Iraqi Bar Association; however, the Bar Association does not actually provide a ‘license’ for Iraqi attorneys.

traditional or kinetic Op Law team and a capacity-building or rule of law team. This method has the benefits of clearer lines of communication and a single chain of command when issues need to be addressed at a higher level, as well as a unity of effort between rule of law and traditional Op Law personnel.

3. Civilian Agencies on the Battlefield

“Whenever possible, civilian agencies or individuals with the greatest applicable expertise should perform a task.”¹³⁷

Counterinsurgency doctrine dictates that civilian agencies perform tasks that are part of their specific mission set and expertise rather than members of the military.¹³⁸ By using civilians, COIN commanders can take advantage of subject matter experts and resources available to civilian agencies. The presence of civilians on the battlefield also helps demilitarize the COIN operation in the eyes of host nation citizens. This demilitarization helps strengthen the political reconciliation necessary to achieve comprehensive success in a COIN operation.¹³⁹ Civilian agencies working with the host nation’s government provide legitimacy for the government’s aims and decrease the legitimacy of the insurgency itself.¹⁴⁰

For JAs, interaction with civilian agencies often raises a host of questions, such as: Can civilian agents utilize military assets for command and control? Can military forces protect civilian agencies? If so, to what extent? How can military forces work with non-governmental organizations, such as the International Committee of the Red Cross (ICRC) or the U.N. Assistance Mission–Iraq? Operational Law JAs must understand U.S. regulations with regards to receiving support from or supplying support to these organizations, including manpower, maneuver, and technical support.¹⁴¹ Operational Law JAs must also be aware of the host nation’s laws to make sure that actions taken by civilian agencies do not open their employees up to criminal or civil prosecution under host nation laws. Finally, Op Law JAs support commanders in this endeavor by understanding the legal basis for military operations in the host nation and determining when cooperation between

military forces and civilian agencies is permissible under the authorization to operate in the country.¹⁴²

Civilians were an integral part of MNC–I’s operations and planning effort during this phase of operations. A number of civilians attended JPTs held by various staff sections: federal law enforcement agents sat in on detention operations JPTs; State Department personnel opined on issues involving northern Iraq; and Provincial Reconstruction Team (PRT) members offered expertise on engineering and civil reconstruction projects.¹⁴³ One example of how commanders at various levels also incorporated the advice of civilians was the use of law enforcement professionals, who helped Iraqi security forces, partnered with U.S. forces, to create and prepare criminal case files on insurgents for prosecution in the Iraqi court system.¹⁴⁴ Multi-National Corps–Iraq also worked with civilians from international organizations, such as the ICRC, which inspected detention facilities across Iraq to ensure they complied with international standards.

At MNC–I, Op Law JAs strived to maximize the use of civilian agencies and contractors and succeeded by following a number of approaches.¹⁴⁵ For instance, MNC–I provided contractors with training packets on the RUF for

¹⁴² During U.S. operations in Kosovo in 1999, JAs, looking at both the authority under the North Atlantic Treaty Organization’s OPLAN for Operation Joint Guardian and the UN Participation Act, were able to allow the U.S. task force in the Kosovo peacekeeping operation to provide transportation, security, and facility support to the International Criminal Tribunal for the Former Yugoslavia. *See CTR. FOR LAW & MILITARY OPERATIONS IN KOSOVO: 1999–2001 LESSONS LEARNED FOR JUDGE ADVOCATES* (15 Dec. 2001); *see CLAMO CONTINGENCY OPERATIONS*, *supra* note 141.

¹⁴³ Having Provincial Reconstruction Team (PRT) members on some of these JPTs was particularly useful because the PRTs were heavily reliant on military transportation assets to accomplish the missions they had been tasked to achieve. By learning their limits and requirements military planners could better account for what assets would be needed to help accomplish both their mission and the militaries mission.

¹⁴⁴ *See, e.g.*, Captain Ronald T. P. Alcala, *Prosecution Task Forces and Warrant Applications in Multinational Division–Center*, in *THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH.*, *CTR. FOR LAW & MILITARY OPERATIONS, RULE OF LAW HANDBOOK: A PRACTITIONER’S GUIDE FOR JUDGE ADVOCATES* 291–93 (2009). Judge advocates at MNC–I Rule of Law Division worked to develop prosecution task forces at various levels of command throughout MNC–I. These prosecution task forces incorporated the experience and knowledge of lawyers, police officers, Soldiers, and civilians with the goal of developing the necessary procedures that Iraqi security force members needed to take a case from investigation all the way to prosecution in an Iraqi court of law.

¹⁴⁵ United States military commanders were attempting to maximize the use of civilian agencies and contractors because they were trying to reduce the U.S. Armed Forces footprint without losing the level of support provided to the Iraqi Government. Using contractors can be a politically sensitive issue and some commanders may be frustrated with the prospect of having to spend money to achieve objectives perfectly within the capabilities of U.S. servicemembers. Commanders should consider, however, the strategic impact that a large troop presence has on a host nation during a COIN operation.

¹³⁷ FM 3-24, *supra* note 2, at 2-9.

¹³⁸ *Id.* Additionally, civilian agencies do not bring a martial presence during interactions with host nation populations. This helps decrease the heavy footprint that a military can have on a host nation’s soil.

¹³⁹ *Id.* at 2-4.

¹⁴⁰ *Id.*

¹⁴¹ *See generally* CTR. FOR LAW & MILITARY OPERATIONS, U.S. GOVERNMENT INTERAGENCY COMPLEX CONTINGENCY OPERATIONS ORGANIZATIONAL AND LEGAL HANDBOOK (24 Feb. 2004) [hereinafter CLAMO CONTINGENCY OPERATIONS].

their own use.¹⁴⁶ Department of Defense (DoD) civilian workers were also provided with emergency jurisdiction cards explaining their status under the U.S.-Iraq SA in case they were detained by Iraqi security forces.¹⁴⁷ Multi-National Corps-Iraq Op Law JAs additionally worked with MNF-I on interpreting the SA¹⁴⁸ in order to afford Coalition forces maximum flexibility while operating under a new legal framework in Iraq. In Basra, the MNC-I Op Law JA even helped organize military transportation from the Forward Operating Base (FOB) so civilian PRT personnel could complete their missions.¹⁴⁹

The inpatient care period of a COIN can set the conditions for continuing success. If the COIN force fails to establish a firm foundation upon which the host nation can build, it becomes exceedingly difficult to achieve sustainable security. Operational Law JAs can use their training in international law and legal reasoning to develop innovative solutions for the commander. By shifting the focus from kinetic operations to capacity building, expanding the emphasis on the rule of law, and utilizing civilian expertise, Op Law JAs can provide significant input for commanders and their staffs at various levels during this crucial phase. As noted in this section, MNC-I JAs discovered this firsthand in Iraq by ensuring all the staff sections were focused on conducting operations “by, with, and through” the Iraqi security forces; by creating a distinct Rule of Law Division focused on developing and fostering Iraqi rule of law projects;¹⁵⁰ and by recommending that civilian experts work in the planning sections and on the ground with tactical units to serve as force multipliers. These examples demonstrate how Op Law JAs can and should plan ahead during COIN operations. Such forethought can prove decisive in the final phase of COIN: the movement to self-sufficiency.

C. Outpatient Care—Movement to Self-Sufficiency

“Unless these men were faced with the urgency of a time limit, there would always be procrastination. As long as Britain held power it was always possible to attribute failure to her. Indians must be faced with the fact that in a short space of time they would have responsibility thrust upon them.”¹⁵¹

The final stage of COIN operations involves the least amount of conventional military involvement; however, it can be the most fragile stage of a COIN struggle.¹⁵² As the host nation begins to formally take control over its territory, military forces from other nations assisting in the COIN fight must begin to reduce their presence.¹⁵³ While this process occurs, there is always the possibility for fall back if the host nation’s forces are unable to take control without the benefit of those external military forces assisting in the COIN.¹⁵⁴

In the outpatient care phase, Op Law JAs are intimately involved in defining, interpreting, and implementing the long-term relationship between the host nation and the nations assisting in the COIN. During the development of this relationship with the host nation, Op Law JAs must assist non-domestic military forces respect the host nation’s sovereignty by restraining their application of force. These military forces must allow the host nation’s fledgling government to develop its security and stability resources. The role of Op Law JAs in this phase is to assist the COIN force in providing the host nation’s government the flexibility and leeway to administer its country’s problems in its own way through its own resources and legal mechanisms.

The XVIII ABN Corps OSJA was wrapping up its deployment during the initial stages of the outpatient care phase in Iraq. Notwithstanding the fact that the XVIII ABN Corps was not present for the duration of the outpatient care phase, the signing of the SA, can serve as an example of what types of issues Op Law JAs will face trying to define, interpret, and implement a long-term relationship with the host nation during the final phase of a COIN operation. Shifting the emphasis to host nation sovereignty and responsibility during this final stage of a COIN can create a critical foundation for the continued development of stability and security in the host nation.¹⁵⁵

¹⁴⁶ Headquarters, MNC-I, OPORD 08-02, at tab G (rules for the use of force for contractors) to app. 11 (rules of engagement) to annex C (operations) (10 May 2008).

¹⁴⁷ The jurisdictional card given to Department of Defense (DoD) civilians was similar to those issued to servicemembers. See *infra* note 178.

¹⁴⁸ Security Agreement, *supra* note 46. The SA was an overarching agreement that had general provisions that provided guidance on the continued U.S. presence in Iraq.

¹⁴⁹ In Basra, the Rule of Law Division of the PRT was led by U.S. State Department members working under the British Foreign Commonwealth Office. As a result, U.S. PRT members relied on the U.K. military forces for security when traveling off the FOB. One of the Op Law JAs working down in Basra helped the PRT members more effectively utilize British military forces to get off the FOB on a regular basis.

¹⁵⁰ In addition, those JAs working in rule of law were able to share with the MNC-I staff sections the unique perspective of Iraqi lawyers, judges, judicial protections officers, prison wardens, police officers, and political figures they came into contact with during their efforts to strengthen the rule of law in Iraq.

¹⁵¹ MANMATH NATH DAS, PARTITION AND INDEPENDENCE OF INDIA—INSIDE STORY OF THE MOUNTBATTEN DAYS 29 (1982). This quote from Clement Richard Attlee, Prime Minister of Britain from 1945–1951, regarded the need to announce a deadline for the transfer of power from the British RAJ to an independent and national Indian Government.

¹⁵² FM 3-24, *supra* note 2, at 1-27.

¹⁵³ *Id.* at 5-25.

¹⁵⁴ *Id.* at A-5.

¹⁵⁵ I Corps OSJA received the mission to continue building success in the outpatient care phase of the Iraqi COIN. As they complete their tour, their

1. The U.S.-Iraq Security Agreement

*“The more successful the counterinsurgency is, the less force can be used and the more risk must be accepted.”*¹⁵⁶

The signing of the SA proved to be one of the most interesting and unique legal issues faced by the MNC-I OSJA.¹⁵⁷ As Thanksgiving 2008 approached, rumors circulated that the SA, which would allow U.S. forces to stay in Iraq past the expiration of the UNSCR, was going to pass the Iraqi Council of Representatives¹⁵⁸ (COR).¹⁵⁹ The expiration of the UNSCR meant that the Government of Iraq would exercise full sovereignty over the country. This transfer of authority would occur as weekly attacks were dropping below a hundred per week for the first time since 2004.¹⁶⁰ Nevertheless, the passage of the SA and the requirement to conduct all operations in partnership with Iraqi security forces¹⁶¹ created a new burden for MNC-I. The SA truly put the onus on Iraqi security forces to take responsibility for the security in their country. Separately, U.S. commanders at every level wanted to know whether this new legal framework for operations created any new risks or challenges for their servicemembers. All the MNC-I staff sections prepared for this major change in the Iraqi operational scheme; however, the MNC-I Op Law Division played a primary role in guiding staff sections with respect to the implementation of the SA.

experiences, techniques, and solutions to some of the difficult questions faced during this phase of the operation may prove to be the final chapter of this look into Op Law as it relates to COIN Doctrine. We recommend that any students of COIN doctrine who viewed this article as useful read the after action reports and articles that will inevitably follow I Corps’s successful tour.

¹⁵⁶ FM 3-24, *supra* note 2, at 1-27.

¹⁵⁷ It is important to note that the MNC-I OSJA was not closely involved with the negotiations that led to the SA. Those negotiations were led by attorneys at MNF-I, the DoD, and the Department of State. While MNC-I JAs provided comments during the negotiation stage on different rough drafts of the SA, the MNC-I OSJA’s primary function was with the implementation of the SA across all coalition forces and foreign contractors in Iraq.

¹⁵⁸ The Iraqi Council of Representatives is the national level legislative body currently comprised of 275 members from various ethnic and religious sects of Iraqi society.

¹⁵⁹ See Security Agreement, *supra* note 46. This was an incredibly difficult period for Op Law JAs at all levels, because commanders wanted guidance so they could train and prepare their servicemembers for the new operating environment. Operational Law JAs had to tread a fine line. On the one hand, JAs at MNC-I had to be able to articulate why this new agreement would result in few to no changes in the process and procedures employed by the servicemembers on the ground since the beginning of the Iraq conflict under the authority of the UNSCR. However, on the other hand, the Op Law JAs had to impress upon the corps staff that the SA was a major and fundamental change in the legal framework of operations within Iraq so as to ensure all sections adequately planned for the implementation of the agreement.

¹⁶⁰ See U.S. DEP’T OF DEF., REPORT TO CONGRESS, MEASURING SECURITY AND STABILITY IN IRAQ, *supra* note 76.

¹⁶¹ See *supra* note 46.

The MNC-I Op Law JAs worked closely with the MNF-I OSJA to define and interpret all the sections of the SA in a way that would provide maximum flexibility to operational commanders. Subordinate units and MNC-I staff sections sought the advice of Op Law JAs as to how the SA would affect their activities.¹⁶² However, pushing information out to units so that servicemembers at all levels would feel confident and comfortable operating within the new legal framework created by the SA was a challenge. The two areas in particular that caused the most concern and required the most operational legal analysis were the possibility of Iraqi jurisdiction over U.S. servicemembers and the need for Iraqi involvement in the approval of U.S. military operations.¹⁶³ The MNC-I Op Law JAs took a two-tiered approach to each of these issues. First, they interpreted the agreement in a manner consistent with its language but favorable to U.S. goals. Second, they provided servicemembers with a tangible product to assist them in understanding and operating within the new legal framework. Two subjects addressed in the SA—military operations and jurisdiction—serve to illustrate how the MNC-I Op Law Division approached the implementation of the new legal framework.

a. Military Operational Approval Under the SA

*“All such military operations that are carried out pursuant to this Agreement shall be conducted with the agreement of the Government of Iraq. Such operations shall be fully coordinated with Iraqi authorities.”*¹⁶⁴

A plain reading of the language from article 4(2) of the SA would appear to severely hinder the flexibility and initiative of U.S. commanders. As the U.S.-Iraqi bilateral committees,¹⁶⁵ which were responsible for interpreting and

¹⁶² For example, the targeting section at MNC-I met with Op Law JAs to establish what impact the SA had on their ability to approve individual targets for contingency operations vis a vis article 4 of the SA which requires coordination and approval by the government of Iraq for military operations.

¹⁶³ Security Agreement, *supra* note 46. There are numerous sections of the SA that raised concerns with commanders and operational planners; however, during the XVIII ABN Corps tenure, these issues were the ones that required immediate and rapid attention. Again, in looking at a holistic view of the Iraq COIN operation, one should consider the additional lessons learned by the I Corps OSJA when evaluating or planning for the outpatient phase of COIN operations.

¹⁶⁴ *Id.*

¹⁶⁵ “The coordination of all such military operations shall be overseen by a Joint Military Operations Coordination Committee (JMOCC) to be established pursuant to this Agreement. Issues regarding proposed military operations that cannot be resolved by the JMOCC shall be forwarded to the Joint Ministerial Committee.” *Id.* art. 4. Since the SA was not approved by the Government of Iraq until early December 2008, less than thirty days before it would go into effect, there was not enough time for the United States and their Iraqi counterparts to establish these committees. Basic questions as to who would be on these committees, or where and how often these committees would meet were still unanswered by 1 January 2009 when the SA was suddenly in full effect across Iraq. Even well after 1

defining the terms of the SA, were not functioning immediately after the adoption of the SA, it fell to Op Law JAs from MNC-I and MNF-I to provide a reasonable interpretation of this section to commanders. Mindful of the SA, commanders sought advice from the legal offices at MNC-I and MNF-I on how to conduct operations in their respective battlespaces without violating the terms of the SA and without coming into conflict with the Iraqi security forces operating alongside U.S. forces. The MNC-I Op Law Division worked hard to limit the impact of article 4(2) on U.S. military operations in Iraq.

First, per the language of the SA, article 4 only applies to “military operations.”¹⁶⁶ While the MNC-I and MNF-I Op Law JAs’ specific interpretation of what the term “military operations” encompassed continues to remain classified, it is important to note that the Op Law JAs at both MNC-I and MNF-I viewed this term as a limitation on the scope of operations that required agreement and coordination with Iraqi authorities.¹⁶⁷ In other words, U.S. commanders, planning operations that could not reasonably be characterized as military operations based on guidance from MNC-I and MNF-I, were not required to seek prior approval or coordinate with Iraqi authorities. Notwithstanding the limitation of article 4’s application to military operations, the MNC-I Op Law JAs advised subordinate units and commanders to empower and facilitate the development of Iraqi security forces by planning and coordinating as many of their operations as possible with their Iraqi counterparts.¹⁶⁸

Article 4 also requires that all military operations be “conducted with the agreement of the Government of Iraq. Such operations shall be fully coordinated with Iraqi authorities.”¹⁶⁹ United States commanders in Iraq expressed concern that this provision would require coordination with multiple layers of bureaucracy within the Iraqi chain of command in order to conduct operations in a responsive and timely fashion. In response, Op Law JAs at MNC-I

January 2009, these committees were not particularly well-staffed by Iraqi counterparts from their military and governmental structure.

¹⁶⁶ *Id.*

¹⁶⁷ Multi-National Force-Iraq and MNC-I classified many of their interpretations of the SA, not because this information affected any specific sources or methods of U.S. intelligence collection, but rather because the U.S. Government was engaging in high level negotiations with the Iraqi government as to the interpretation and implementation of this SA. In order to protect the integrity of those negotiations as well as to prevent the Iraqi government from drawing any negative inferences from the MNF-I and MNC-I interpretations of the SA for the purposes of immediate implementation, U.S. forces kept certain interpretations at a classified level.

¹⁶⁸ As stated previously in this article, one of the overall goals of COIN is to provide legitimacy to the host nation government. By allowing Iraqi commanders to take the lead in all operations, U.S. forces facilitated legitimacy for these commanders both in the eyes of the populace and the Iraqi servicemembers who served in their command. *See generally* FM 3-24, *supra* note 2, at 1-21

¹⁶⁹ Security Agreement, *supra* note 46, art. 4.

examined the language and determined that the SA did not specify the level of coordination or agreement required prior to conducting military operations. Since MNC-I’s guidance was to conduct all operations “by, with, and through” the Iraqi security forces, MNC-I Op Law JAs advised commanders to continue conducting operations in the same manner as they had prior to implementation of the SA. In other words, U.S. commanders conducting operations “by, with, and through” the Iraqi security forces, were de facto seeking the agreement of and coordinating with the Iraqi Government.¹⁷⁰

As noted earlier, Op Law JAs also created products to assist servicemembers in the field adjust to the different legal challenges and concerns in Iraq as a result of the SA. For example, MNC-I JAs created a *Leader’s Guide to the Security Agreement* tri-fold and two SA training presentations to help commanders and servicemembers understand article 4 of the SA. The *Leader’s Guide* was a quick reference sheet providing basic information on the SA. One of the presentations was an unclassified brief and the other a classified brief detailing exactly how the operating environment in Iraq had changed as a result of the SA. These products provided a vast amount of information on the SA and included specific information about interacting and operating alongside Iraqi security forces.¹⁷¹

United States commanders are rightfully cautious about placing the approval of their operations in the hands of a fledgling host nation security force; however, during the outpatient phase of COIN, it is important to focus commanders and staff members on the transition from combat to sustainment operations and the goal of legitimizing the new host nation government. By interpreting future agreements like the SA in a manner that fosters decision-making at lower levels among parallel U.S. and host nation commanders, Op Law JAs can achieve the twin goals of bolstering the legitimacy of host nation

¹⁷⁰ In article 4 of the SA, there are provisions for handling disputes between Iraqi and U.S. officials that commanders could utilize in the event there was a disagreement as to whether U.S. forces had the authority to conduct certain types of operations. It was the goal of both U.S. and Iraqi forces to avoid elevating issues to the highest diplomatic levels. Consequently, U.S. commanders continued to conduct military operations by, with, and through their parallel or mirror commanders to great effect without having to resort to high-level negotiations.

¹⁷¹ For the two SA PowerPoint training presentations, MNC-I Op Law JAs provided detailed notes for each presentation with the intent that JAs and leaders at all levels could take the presentations and use them to train their servicemembers. The *Leader’s Guide to the SA* tri-fold was a quick reference sheet that contained the MNC-I Commander’s guidance for operating under the SA and information that would be useful to leaders when they had questions about situations on the ground and needed quick answers. In order to ensure maximum distribution, these products were available for download on the MNC-I web portal. In addition, MNC-I Op Law and rule of law JAs administered SA training to units upon request. Furthermore, utilizing the FRAGO process, all servicemembers in Iraq were required to carry the *Leader’s Guide to the SA* tri-fold on their persons when they were outside of U.S.-controlled operating bases.

security forces and protecting the commanders' interest in maintaining operational flexibility.

b. Jurisdiction Under the SA

*"Iraq shall have the primary right to exercise jurisdiction over members of the United States Forces and of the civilian component for the grave premeditated felonies enumerated pursuant to paragraph 8, when such crimes are committed outside agreed facilities and areas and outside duty status."*¹⁷²

Article 12 of the SA on first impression appeared to provide Iraq with a great deal of authority over U.S. servicemembers, and commanders wanted to know how they should respond if Iraqi security forces attempted to arrest a U.S. servicemember. Since the U.S.-Iraqi bilateral committees, as mentioned earlier, were not functioning immediately after the adoption of the SA, MNC-I and MNF-I Op Law JAs were responsible for interpreting the terms of article 12. They interpreted three specific sections of this article in a manner that would provide the maximum amount of protection for U.S. servicemembers, while still promoting the outpatient care goals of the COIN fight at this stage.

First, article 12 states that Iraq maintains jurisdiction over U.S. servicemembers only for "grave premeditated felonies enumerated pursuant to paragraph 8."¹⁷³ Thus, Iraqi security forces could only arrest and prosecute U.S. servicemembers for the suspected commission of certain grave premeditated felonies. However, because the committees responsible for determining which felonies qualified for Iraqi jurisdiction over U.S. forces still did not exist, MNC-I Op Law JAs advised commanders that until such a list was promulgated, Iraq could not assert jurisdiction over U.S. forces.

¹⁷² Security Agreement, *supra* note 46, art. 12. Paragraph 8 of the Security Agreement reads,

Where Iraq exercises jurisdiction pursuant to paragraph 1 of this Article, members of the United States Forces and of the civilian component shall be entitled to due process standards and protections consistent with those available under United States and Iraqi law. The Joint Committee shall establish procedures and mechanisms for implementing this Article, including an enumeration of the grave premeditated felonies that are subject to paragraph 1 and procedures that meet such due process standards and protections. Any exercise of jurisdiction pursuant to paragraph 1 of this Article may proceed only in accordance with these procedures and mechanisms.

Id.

¹⁷³ *Id.*

Next, article 12 states that in order to fall within the ambit of Iraqi jurisdiction, the crime must have been committed outside of a U.S. operating base by a servicemember not on duty status.¹⁷⁴ This provision circumscribed the scope of Iraqi jurisdiction, and commanders could thus limit servicemembers' exposure to this jurisdiction by ensuring that servicemembers only left U.S. bases when they were on official business.¹⁷⁵ The MNC-I Op Law Division also advised commanders that servicemembers traveling outside U.S. facilities on official business should always be in the official duty uniform and never in civilian clothing.

Lastly, article 12 provides that, when Iraq exercises jurisdiction pursuant to the SA, "members of the U.S. forces and of the civilian component shall be entitled to due process standards and protections consistent with those available under U.S. and Iraqi law."¹⁷⁶ This language was viewed by OP Law JAs at MNC-I and MNF-I as providing a catchall protection for U.S. servicemembers. Op Law JAs advised commanders that Iraq could assert its jurisdiction over U.S. servicemembers only in a way that was consistent with the criminal procedure protections present within the U.S. Constitution.¹⁷⁷ If Iraq did not offer criminal procedure protections that were consistent with the U.S. Constitution, then Iraq could not arrest or prosecute a U.S. servicemember under the plain language of the SA.

In addition to interpreting and providing guidance on the SA, MNC-I Op Law JAs produced tangible reference guides to inform both commanders and individual servicemembers of jurisdiction and due process protections under the SA. Operational Law JAs also created a guide to inform Iraqi security forces of their jurisdictional constraints over U.S. servicemembers under the SA. The finished product took the form of a card, which became known as the "Emergency Jurisdictional Chit."¹⁷⁸ The jurisdictional chit

¹⁷⁴ *Id.*

¹⁷⁵ Though the specific guidance given to commanders after the implementation of the SA regarding the conditions for when servicemembers could leave coalition bases and for what purposes is classified, the plain language of SA provides a common sense approach. Simply stated, as long as servicemembers were conducting official business whenever they were outside of U.S. bases, they were sufficiently limiting their exposure to Iraqi jurisdiction.

¹⁷⁶ *Id.*

¹⁷⁷ Again, the committees responsible for establishing joint procedures that would ensure compliance with the processes and procedures present in the U.S. criminal justice system were not yet established when the SA came into effect. Consequently, MNF-I and MNC-I Op Law JAs viewed this particular section of article 12 as a limit on Iraqi jurisdiction until such procedures could be established. The final determination as to the procedures developed by these committees during I Corps tenure in Iraq would be instructive for future COIN operations with similar jurisdictional questions that will inevitably spring up during the outpatient phase.

¹⁷⁸ The card became known as the 'Emergency Jurisdictional Chit,' because it was seen as an important document for servicemembers to carry with them at all times. Similar to the 'blood chits' carried by pilots during armed conflicts, which encouraged the local population to assist in the return of a

was a two-sided card containing information in English and Arabic that described Iraqi jurisdiction under the SA. It instructed Iraqi security force members to return seized U.S. servicemembers to a coalition base and to work out jurisdictional issues through the bilateral committee system as provided in the SA. The Emergency Jurisdictional Chit, like the ROE card, eventually became one of the documents every servicemember was required to carry with them when they left coalition bases. Many small units even required servicemembers to present the jurisdictional chit during pre-combat inspections and rehearsed how to use the jurisdictional chit if detained by Iraqi security forces.

Though the SA is unique to the Iraq theater of operations, it is likely that future COIN operations will include a legal framework similar to the SA during the outpatient care phase. Operational Law JAs must be prepared to draft as well as interpret agreements between the United States and a host nation involved in a COIN that establish a new legal framework for operations.¹⁷⁹ Under any legal framework, the extent of host nation jurisdiction over U.S. servicemembers will always be a central concern.¹⁸⁰ By interpreting agreements in a way that is consistent with the plain language of the document yet still supportive of U.S. goals, Op Law JAs can prevent jurisdictional issues from muddying operational planning and mission execution. In addition, designing a tangible product, like the jurisdictional chit that provides servicemembers with a means of protecting themselves from jurisdictional overreaching by a host nation, can be valuable.¹⁸¹

pilot who was shot down, the jurisdictional chit instructed Iraqi security forces to return U.S. servicemembers to their bases. *See generally* R.E. BALDWIN, THE LAST HOPE: THE BLOOD CHIT STORY ((1997)). However, unlike a blood chit, the jurisdictional chit provided no reward for the return of a U.S. servicemember to a base and instead cited the provisions of the SA as authority for the speedy return of any U.S. servicemember to his or her base.

¹⁷⁹ During negotiations, Op Law JAs should analyze historical legal frameworks negotiated during past operations that help inform any current negotiations. Once a new agreement is in place, Op Law JAs must be able to interpret and provide a clear understanding of the agreement to their commanders identifying and explaining any legal concerns.

¹⁸⁰ There is a growing perception among the international community, whether justified or not, that U.S. forces prosecute wars indiscriminately against civilians within the host nation. This perception is something that our leaders, planners, and Op Law JAs must be prepared to deal with when negotiating and implementing future agreements like the SA in Iraq. Future host nations will inevitably want to expand their jurisdiction over U.S. servicemembers. By adopting an approach similar to that described in this article, Op Law JAs can provide their commanders with a significant level of protection against unnecessary risk to the servicemembers within their command. *See* Sayed Salahuddin, *Air strike Killed 37 Afghan Civilians*, REUTERS, Nov. 9, 2008, available at <http://www.reuters.com/article/latestCrisis/idUSISL410925>; David Zucchino, ‘The Americans . . . They Just Drop Their Bombs and Leave,’ L.A. TIMES, June 2, 2002, at A2; BBC, *Children Die in Afghan Air Raid*, BBC, June 18, 2007, available at <http://news.bbc.co.uk/2/hi/6762549.stm>.

¹⁸¹ An anecdotal but important lesson learned by the XVIII ABN Corps Op Law JAs during the development of the jurisdictional chit was to vet this product, which had instructions in Arabic and English, through multiple

The outpatient phase of a COIN is undoubtedly the most challenging for U.S. Armed Forces. Instead of overwhelming the enemy by force and speed, U.S. servicemembers must patiently support a nascent host nation government as it slowly increases its military strength and domestic legitimacy.¹⁸² Operational Law JAs must be proactive and provide advice to commanders that ensures the safety of servicemembers, while, at the same time, bolstering the legitimacy of the host nation’s government. By succeeding in the outpatient stage of a COIN, U.S. forces can set the conditions that will lead to lasting security for the host nation.¹⁸³

IV. Conclusion

As is the case for all COIN conflicts, the COIN in Iraq will undoubtedly be unique when compared to future conflicts. However, the experiences faced by the Op Law JAs of the XVIII ABN Corps, during their tour in Iraq from 2008–2009, can provide a valuable primer for those attorneys who will face the dynamic legal challenges of future COIN environments. Using this case-study in the planning and execution of future COIN operations, will allow Op Law JAs to use their unique and important legal perspective to further their commander’s COIN goals.

Arabic speakers to determine the colloquial meaning of the phrases used on the chit. After completion of the jurisdictional chit, an Arabic-speaking rule of law JA at XVIII ABN Corps discovered that the classification markings on the Arabic side of the card read ‘Unofficial’ instead of ‘Unclassified for Official Use Only.’

¹⁸² FM 3-24, *supra* note 2, at 1-27.

¹⁸³ Ultimately the goal for any COIN is this simple explanation regarding British operations in Malaya, “The real achievement in Malaya was not simply that the British mounted an effective counterinsurgency effort but that they created a durable political, economic and social infrastructure capable of defending and governing the country after they withdrew.” THOMAS R. MOCKAITIS, BRITISH COUNTERINSURGENCY, 1919–60, at 124 (1990).